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No. 90-1299

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

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CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal court of appeals, which has found an apportionment of fault by a district court to be clearly erroneous under Fed. R. Civ. P. 52(a), have the authority to make new findings of fact, reweigh the evidence and reapportion fault?

2. Should the admiralty rule that liability for damages is to be allocated among the parties proportionately to the degree of their fault be changed so that the relative cost of avoiding the casualty becomes a substantial factor in apportioning fault?

LIST OF PARTIES

The parties to the proceedings below were the petitioner City of Milwaukee and the respondents Cement Division, National Gypsum Company; Reed & Brown, Inc.; New York Marine Managers, Inc.; Allstate Insurance Company, c/o American Marine Underwriters, Inc.; Highlands Insurance Company; Employers Casualty Company of Texas, c/o Texas Marine Underwriters Agency, Inc.; Donald H. Miller, Inc.; U.S. Fidelity and Guarantee Company; Great Lakes Protective Association; The Atlantic Companies; Lloyds Underwriters, Institute Companies, including: Commercial Union Assurance Co. Ltd., "I" A/o. Andrew Weir Insurance Co. Ltd., English & American Insurance Co. Ltd., "M" 1 A/o., Orion Insurance Co. Ltd., "T" A/o. Yasuda Fire & Marine Insurance Co. (U.K.) Ltd., "T" A/o., Atlas Assurance Co. Ltd., "T" A/o., Phoenix Assurance Co. Ltd., British Law Insurance Co. Ltd., Road Transport and General Insurance Co. Ltd., Insurance Company of North America (U.K.) Ltd., "G" A/o., Insurance Company of North America (U.K.) Ltd., "O" A/o., Home Insurance Co. Ltd., "X" A/o., London & Hull Maritime Insurance Co. Ltd., Hanover Insurance Co. Ltd., Sphere Insurance Co. Ltd., Drake Insurance Co. Ltd., Bishopsgate Insurance Co. Ltd., "F" A/o., British Law Insurance Co. Ltd., No. 2 A/o., Minster Insurance Co. Ltd., No. 2 A/o., Insurance Corporation of Ireland, "L" A/o., Folksam International Insurance Co. (U.K.) Ltd., Terra Nova Insurance Co. Ltd. per Andrew Drysdale Ltd., Economic Insurance Co. Ltd., "GENERAL" A/o., c/o Willis, Faber & Dumas Ltd., Ten Trinity Square, London EC3P 3AX England.

LIST OF PARTIES – Continued

Petitioner, City of Milwaukee, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI

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The petitioner, City of Milwaukee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 16, 1990.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 915 F.2d 1154 (7th Cir. 1990), and is reprinted in the appendix hereto. [1a]

The memorandum decision and order of the United States District Court for the Eastern District of Wisconsin (Curran, D.J.) has not been reported. It is reprinted in the appendix hereto. [15a]

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JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1333, the respondents brought this suit in admiralty in the Eastern District of Wisconsin. The Eastern District bifurcated the trial of liability and damages. On June 30, 1989, the Eastern District, after the issue of liability was tried to the court, issued a decision and order which held that both petitioner and respondents were negligent and contributorily negligent and apportioned fault 96 percent against the respondents and four percent against the petitioner. [15a]

Respondents appealed the decision of the Eastern District to the Seventh Circuit under 28 U.S.C. § 1292(a)(3). On October 16, 1990, the Seventh Circuit entered an opinion and judgment reversing the Eastern District's allocation and reapportioned fault two-thirds against the respondents and one-third against the petitioner. [1a] The petitioner filed a petition for rehearing *en banc*, which was denied by the Seventh Circuit on November 21, 1990. [145a]

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

Fed. R. Civ. P. 52(a) Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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STATEMENT OF THE CASE

On December 24, 1979, the SS EM FORD, loaded with 5,700 tons of cement, was moored in a slip in Milwaukee's outer harbor on southern Lake Michigan. In the course of a severe northeasterly winter storm, the FORD, over a twelve-hour period, broke loose from its moorings, battered against the headwall of the slip, tore holes in its hull, took on water and sank to the bottom of the slip.

The owners of the vessel, National Gypsum, and its insurers brought this suit in admiralty pursuant to 28 U.S.C. § 1333 against the City seeking $6.5 million in damages. The suit alleged, among other things, that the City had negligently breached its duty as a wharfinger by failing to warn National Gypsum of a hidden danger in the berthing slip. The City denied fault and alleged in its counterclaim that National Gypsum was negligent in leaving the FORD moored in an outer harbor slip in winter virtually unmanned, and with no means of monitoring weather or summoning tugs or a pilot for assistance. The City sought to recover $250,000 for damages caused by the vessel crashing against the dock walls.

The trial was bifurcated, with the liability portion tried to the District Court without a jury. The District Court, in a 140-page opinion, found both National Gypsum and the City negligent and contributorily negligent, and found National Gypsum 96 percent at fault and the City 4 percent at fault.

National Gypsum, by means of an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3), appealed that portion of the District Court's decision apportioning fault 96/4 as well as a separate issue. The Seventh Circuit, in a 2½ page discussion in its eleven-page opinion, held that the District Court's apportionment of fault was clearly erroneous and reapportioned fault two-thirds upon National Gypsum and one-third upon the City. This eight-fold increase of the City's fault increased the City's potential liability from a range of approximately $0 to $40,000 to a range of approximately $2 million to $4 million, depending upon how the unresolved damages issues will be decided.

The District Court found the facts to be as follows. Upon the FORD's arrival in Milwaukee's outer harbor on December 21, 1979, its captain, Captain Patrick Gallagher, contacted the City's dock superintendent, Stanley Blawas, by radio-telephone. Captain Gallagher notified Blawas that the FORD was instructed to lay up for the winter beginning on December 23, 1979 at National Gypsum's terminal located in the City's inner harbor. Because National Gypsum's terminal was unavailable to the FORD for the next three days, Blawas offered the captain a berth at South Slip No. 1 in the outer harbor for a temporary tie-up. Blawas told the captain that it would be easier for the FORD to maneuver in and out of that slip. The captain accepted the slip without making any inquiry as to its safety and moored the vessel bow in, starboard side to the dock. [33a-34a]

The next morning, December 22nd, National Gypsum changed the FORD's orders and instructed the captain to leave the vessel berthed in the outer harbor, to discharge its officers and crew for the holidays, and then to order their return after Christmas to make one more voyage before returning to Milwaukee for its winter lay-up. [40a] Captain Gallagher did not inform the City of this change in the FORD's plans. [100a] However, when Blawas happened to be on the vessel later that day on other business, the captain did inform Blawas that the FORD would need to tie up for a number of days and that part of the crew would be leaving for the holidays. Blawas then told the captain that the outer harbor could get "heavy" in a storm; Blawas added that the waves in the slip were generally one to two feet. [41a] Blawas offered the captain a more sheltered inner harbor berth, which the captain rejected because the crew had already begun to double the lines and moving the ship would have cost time and money. [42a, 101a] Later on the 22nd, the captain discharged the entire crew, but left aboard five crewmen who agreed to stay as shipkeepers. [42a-43a] Before his own departure, he also shut down the ship's radio-telephone as well as the radio which would normally receive weather reports. [44a-45a]

Although the National Weather Service broadcast weather forecasts for the port area on December 23rd and 24th, which gave clear warning of the severity and direction of the approaching storm, no one on the FORD had been assigned to monitor the weather. At 7:00 A.M. on December 24th, the United States Coast Guard posted gale warnings for southern Lake Michigan. None of those aboard the vessel had heard the forecasts or knew of the warning. [45a-50a] At approximately 1:00 P.M. on December 24th, a crew member noticed that the FORD was 10 to 15 feet off the dock at the stern and the wind velocity and wave height had increased markedly; the boarding ladder, now off the dock, was then brought on board. After unsuccessful efforts to tie up the vessel, tugs arrived at 4:00 P.M., but could not help because there was no pilot aboard the FORD. Tugs returned at 6:00 P.M., but could not contact the ship by radio. [51a-53a]

A licensed pilot did arrive at 5:30 P.M., saw that the bow of the ship was pounding against the headwall, and jumped aboard the FORD, along with three others, to prepare it to be towed from the slip. At 8:00 P.M., the pilot successfully summoned tugs, but by that time the FORD's rolling actions were too severe and attempts to remoor the vessel proved unsuccessful. At 11:00 P.M., the pilot found that the ship was taking on water; near midnight the ship was abandoned by all hands. That night the ship sank to the bottom of the slip. [53a-55a]

The District Court found the City negligent in not adequately warning National Gypsum that wind and wave conditions could develop in the slip occupied by the FORD that would endanger the vessel. Moreover, although the City did not know that the captain planned to discharge virtually the entire crew, the District Court found that the City failed to solicit sufficient information from the captain to decide either to order the vessel to remain manned while tied up or to move off the berth. [57a-58a, 102a-103a]

The District Court found the shipowner negligent because: (1) National Gypsum knew from regulations published earlier by a marine insurance association that Milwaukee's outer harbor was not a safe location to leave a vessel moored in winter without a crew, [37a-38a, 131a] (2) it had been specifically warned by a marine surveyor two weeks before the sinking that Milwaukee's outer harbor was subject to heavy surge in northeasterly winds, [31a-32a] and (3) its captain had been warned by the City that the weather could get "heavy" in the outer harbor. [41a] Despite this knowledge, the District Court found that National Gypsum had failed to follow prudent maritime practices in three significant respects. First, National Gypsum failed to man the FORD with a captain or licensed pilot and sufficient crew to operate the vessel; as a consequence, the FORD could not be moved out of the slip, either by its own power or with assistance of tugs once gale warnings were issued early in the day or later in the day when her lines began to part. [58a, 126a-127a] Second, National Gypsum failed to monitor the weather; as a consequence, no one on the vessel heard the weather forecasts indicating that gale conditions were developing on southern Lake Michigan. [59a, 127a-128a] Third, National Gypsum failed to provide those on board with ship-to-shore communications; as a consequence, they did not learn of the impending storm until the ship moved away from the dock, and, once the ship did move away from the dock, they could not effectively summon help. [128a]

The District Court held that fault should be apportioned in accordance with the relative culpability of the parties and found that National Gypsum had to bear a far greater share of the fault for the casualty than the City. [135a] National Gypsum, the District Court found, consistently chose a course of action that would save it time and money, even at the cost of risk to its vessel. [135a-137a] The District Court found a great disparity in culpability because: (1) the disparity in tasks and duties imposed by law on a shipowner is far greater than those imposed on a wharfinger, (2) the shipowner remained in complete custody and control of the vessel and, therefore, bore the ultimate responsibility for ensuring her safety, and (3) the potential for suffering a large loss was foreseeable to the shipowner because of the large cost of the property – the ship and the cargo – the shipowner had at risk. [138a-139a]

The Seventh Circuit did not find any particular finding of fact or conclusion of law relied upon by the District Court in apportioning fault to be erroneous. It described the District Court's decision as "thorough and largely well-reasoned" and "basically correct;" nevertheless, the Seventh Circuit held that the District Court's apportionment of fault was clearly erroneous. The Seventh Circuit apparently believed that the District Court might have apportioned fault in proportion to the alleged value of the property each party had at risk. The Seventh Circuit based this conclusion upon a single sentence of the District Court's 140-page opinion that the potential of the shipowner incurring a large loss was foreseeable because of the value of the property it had at risk, and upon its observation that the District Court's apportionment of fault ratio was approximately the same as the ratio of the amount of damages alleged in the pleadings. The Seventh Circuit stated that the District Court's "calculations, however they were arrived at" left it with a "definite and firm conviction that a mistake had been committed." It held that it could not accept the District Court's apportionment because either the District Court had considered the value of the respective property at risk, or the District Court had failed to adequately explain in its decision how it had arrived at the apportionment of fault. [10a-11a]

Rather than remand the case to the District Court either to clarify its opinion or to reapportion fault consistent with the Seventh Circuit's opinion, the appellate court decided to reapportion fault based upon the record before it. In doing so, it focused on isolated facts, while not accepting the District Court's evaluation of the entire record. Rather than accept the District Court's finding that the City had inadequately warned the FORD, the Seventh Circuit found that the City had failed to warn the FORD or National Gypsum of any possible danger to the FORD. [4a] The Seventh Circuit also found that the FORD's captain had informed Blawas that "most of the crew would be gone until December 26th or 27th, but that a skeleton crew would be left aboard the FORD during the interim." [4a-5a] This finding charged the City with greater knowledge than that found by the District Court, which had found that the captain of the FORD told Blawas only that "part of the crew would go home for the holiday." [41a] In addition, the Seventh Circuit apparently afforded other significant findings of the District Court less weight than the District Court provided in its decision. [3a-4a]

The Seventh Circuit then applied a new standard of measure of liability to a maritime case. "The doctrine of comparative negligence" the court announced "is generally supposed to be used to assess liability in proportion to the cost of avoiding the entire accident to each side." [11a] The City could have told the captain more about possible wave conditions in the slip and could also have asked the captain more searching questions about his lay-up plans at no cost, and because the captain could have undertaken some investigation on his own or could have questioned Blawas more closely at no cost, the Seventh Circuit concluded that no reasonable trier of fact could apportion more than two-thirds of liability to National Gypsum. Although the Seventh Circuit apparently found the "cost of avoidance" to be equal, it concluded that National Gypsum must bear a greater share of the fault than the City because a captain is ultimately responsible for his ship and, in this case the captain had left the FORD "a sitting duck." On this basis the Seventh Circuit reapportioned fault two-thirds upon National Gypsum and one-third upon the City. [11a-12a]

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REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Unauthorized Finding of Fact and Reapportionment of Fault on Appeal (1) Conflicts with Decisions of this Court, and (2) Deprives the Petitioner of an Appeal as a Matter of Right.

In violation of a rule this Court has described as "elementary," proceeding in a fashion this Court has described as "incredible," in direct conflict with three recent decisions of this Court, without statutory authority, and without hearing the key testimony it relied upon, the Seventh Circuit appropriated from the District Court the task of finding the facts in this case. This appropriation has resulted in a decision that was not only rendered without lawful authority, but also is erroneous and unjust in result. As a consequence, the City, burdened with a judgment that will cost it millions of dollars, has in effect been deprived of the right to appeal an erroneous finding of fact to a higher court. This unauthorized, drastic and unjust reordering of the federal judicial process deserves this Court's attention.

A. The Seventh Circuit's Decision Conflicts with Decisions of This Court and its Ruling Exceeds its Appellate Authority.

It is not disputed that an apportionment of fault in an admiralty case is a finding of fact and not a conclusion of law. This Court held in *McAllister v. United States,* 348 U.S. 19 (1954), that a finding of negligence in an admiralty case tried to the court is a finding of fact that must be reviewed under the "clearly erroneous" standard. *Id.*

at 20.[1] Accordingly, the "clearly erroneous" standard of review is applied to an admiralty court's apportionment of fault in accordance with comparative negligence principles in collision (two or more moving vessels) or allision (involving fixed objects) cases in all circuits that have considered the issue.[2]

In three unequivocal decisions, this Court has held that federal appellate courts, in reviewing a district court's decision pursuant to Rule 52(a), should not make factual findings on their own. In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court held that findings of "ultimate fact" – in that case a finding of discrimination – are subject to review under the "clearly erroneous" standard of Rule 52(a), and, accordingly, appellate courts are without authority to make independent findings of "ultimate fact," even if the "ultimate fact" found is based upon subsidiary facts found by the district court. *Id.* at

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[1] Prior to the decision of this Court in *McAllister v. United States*, 348 U.S. 19 (1954), federal appellate courts had the power to conduct *de novo* reviews in admiralty cases. In 1966, the Federal Rules of Civil Procedure were made applicable to admiralty cases, except for prize proceedings. Fed. R. Civ. P. 1, 81(a)(1).

[2] *See, e.g, Phillips Petroleum Co. v. Stokes Oil Co., Inc.*, 863 F.2d 1250 (6th Cir. 1988); *In re White Cloud Charter Boat Co., Inc.*, 813 F.2d 1513 (9th Cir. 1987); *SCNO Barge Lines, Inc. v. Sun Transp. Co.*, 775 F.2d 221 (8th Cir. 1985); *Ente Nazionala Per L'Energia Electtrica v. Baliwag Nav. Inc.*, 774 F.2d 648 (4th Cir. 1985); *Canal Barge Inc. v. China Ocean Shipping Co.*, 770 F.2d 1357 (5th Cir. 1985); *Harbor Tug & Barge, Inc. v. Belcher Towing Co.*, 733 F.2d 823 (11th Cir. 1984); *Getty Oil Co. (Eastern Operations) Inc. v. SS Ponce DeLeon*, 555 F.2d 328 (2d Cir. 1977). The Seventh Circuit acknowledged that it was bound by the "clearly erroneous" standard of review in this case. [10a]

285-87. As a consequence, in cases where a district court has failed to make a finding because of an erroneous view of the law, or where the findings are infirm because of an erroneous view of the law, "a remand is the proper course unless the record permits only one resolution of the factual issue." *Id.* at 292. All this, the Court noted "is elementary." *Id.* at 293. For an appellate court to proceed to make its own finding of ultimate fact, as the Seventh Circuit did in this case by its reapportionment of fault, was described by this Court as "incredible." *Id.* at 293.

The rationale for the limited review permitted under Rule 52(a) was stated by this Court in *Anderson v. Bessemer City,* 470 U.S. 564 (1985):

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes,* 422 U.S. 72, 90, 53 L.Ed. 2d 594, 97 S.Ct. 2497 (1977).

Id. at 574-75. In *Anderson* this Court held that the Fourth Circuit erred when it did not limit its review to a determination of whether the district court's findings were clearly erroneous, but instead made findings of fact on its own by drawing factual conclusions from both the facts found by the district court and from its own interpretation of the testimony.

In *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986), this Court held unequivocally that a federal appellate court in reviewing a district court's decision pursuant to Rule 52(a) should not make factual findings on its own. This Court stated:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Id. at 714.

Had the Seventh Circuit followed the decisions of this Court in *Pullman-Standard, Anderson,* and *Icicle Seafoods,* it would have reviewed the record as a whole to determine if the allocation of fault was clearly erroneous.[3] If it concluded that the apportionment was clearly erroneous, it should have remanded the case to the District Court for reapportionment in light of its decision. If the Seventh Circuit could not determine the basis of the District Court's decision, then it should have remanded the case for clarification. *Landau v. J.D. Barter Const. Co.*, 657 F.2d 158, 164 n.12 (7th Cir. 1981). Instead, the Seventh Circuit, after deciding the District Court might have applied an incorrect legal standard, proceeded to decide the case itself by engaging in the kind of fact finding this Court held in *Pullman-Standard, Anderson,* and *Icicle Seafoods,* that circuit courts are without authority to do.[4] The Seventh Circuit reached into the record to find facts different from those found by the District Court, placed less weight on certain facts found by the District Court, weighed all the evidence in accordance with a new standard of measure, and independently made the "ultimate finding" in the case: the apportionment of fault.

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[3] Review of the whole record is required even if the district court relied upon a wrong ground in arriving at its decision, because that alone does not justify reversal. It is a settled rule of law that in reviewing a decision of a lower court, the appellate court must affirm if the result is correct, "although the lower court relied upon a wrong ground or gave a wrong reason." *Securities & Exchange Commission v. Chenery Corp.,* 318 U.S. 80, 88 (1943) (*quoting, Helvering v. Gowran,* 302 U.S. 238, 245 (1937)).

In reviewing the conversation that was the basis for the finding of liability against the City, the Seventh Circuit, without specifically finding it to be "clearly erroneous," ignored the District Court's finding that Blawas "warned that the outer harbor could get 'heavy' if a storm came up." [41a] Instead, the Seventh Circuit, relying upon its own interpretation of the transcript, found that "the City failed to warn" the FORD or National Gypsum of "any possible danger to the FORD." [4a] In interpreting Blawas' testimony, the Seventh Circuit apparently gave no credence to the testimony of an impartial witness, Walter Heckl, who described the conversation as a warning and whose testimony was found to be credible and relied upon by the District Court. [101a] Instead, the Seventh Circuit gave greater weight to what Blawas might have meant when he told the captain that waves in the outer harbor could "get a little rough." In addition, the Seventh Circuit considered the conversation in an isolated fashion and, not, as the District Court, in the context of the record as a whole.[5] [5a]

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[4] Title 28 U.S.C. § 2106, empowering the federal appellate courts to modify judgments, decrees, and orders of the lower courts does not empower them to exercise authority in the course of a Rule 52(a) review beyond the limits defined in Rule 52(a). *Felder v. United States*, 543 F.2d 657, 671 (9th Cir. 1976). Otherwise, the appellate courts in *Pullman-Standard, Anderson,* and *Icicle Seafoods* would have had free reign to decide the cases as they did.

The Seventh Circuit found that on the morning of December 22, 1979, the captain of the FORD informed Blawas that "most of the crew would be gone until December 26th or 27th, but that a skeleton crew would be left aboard the FORD during the interim." [4a-5a] In contrast, the District Court found that the captain of the FORD stated only that "part of the crew would go home for the holiday." [41a] The Seventh Circuit's finding charged the City with greater knowledge of the make-up of the remaining crew than found by the District Court, which specifically found that the City was not fully informed of the undermanning of the FORD when it noted that "unbeknownest [sic] to the City – the entire crew was being discharged and the captain was going on vacation." [100a-101a, n.29] Yet the Seventh Circuit did not find the District Court's finding on this point to be clearly erroneous.

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[5] The captain did not call Blawas to the ship; Blawas was on the ship by chance on other business. [41a, 100a] Blawas testified that the captain called Blawas forward to discuss access to shore power; the discussion of weather was an aside. The captain was anxious to go home for the holidays. [40a] He was unreceptive to the "heavy" weather warning and did not question Blawas further. [101a]

In reference to other significant findings of the District Court, the Seventh Circuit did not find any to be clearly erroneous, but apparently gave them less weight than did the District Court. The District Court found (1) that the FORD's captain "knew or should have known of any dangers which could have developed due to wind and wave action" in Milwaukee's outer harbor and South Slip No. 1 due to his training and experience as a Great Lakes ship master and his experience with similar harbors [36a], (2) that it was "open and obvious" that the slip had little breakwall protection from wave action from the northeast, [37a], (3) that National Gypsum knew that Milwaukee's outer harbor was not a safe location to leave a vessel moored in winter without a crew [37a-38a, 131a], and (4) that National Gypsum was specifically warned of the danger in reference to the mooring of the FORD at that location. [31a-32a] The Seventh Circuit's watered-down descriptions of these District Court findings indicate that the Seventh Circuit placed less weight on them than did the District Court. In describing these findings, the Seventh Circuit stated that National Gypsum was "aware" of the regulations that prohibited winter mooring in Milwaukee's outer harbor because of the dangers of wave surges from northeasterly winds, that National Gypsum had been "informed" in December of 1979 that ships berthed in Milwaukee's outer harbor were subject to heavy surges during storms with northeasterly winds, and that the District Court "thought" that the FORD's captain could have predicted the possibility of wave surges based on the construction of the berth and his experience in general. [3a-4a]

The Seventh Circuit then, in order to apportion fault, weighed the evidence in accordance with its own precepts. Rather than apportion fault solely on culpability, the Seventh Circuit initially apportioned fault based upon the "cost of avoidance" to each party. It concluded that the "cost of avoidance" was the same for each party because both the City and the captain could have avoided the entire accident by being more forthright and asking more questions. Nevertheless, the Seventh Circuit agreed with the District Court that National Gypsum must bear more fault than the City because its captain was ultimately responsible for the ship and he had left it "a sitting duck." Based upon these precepts and the facts as found by the Seventh Circuit, it apportioned fault two-thirds upon National Gypsum and one-third upon the City. [11a-12a]

The Seventh Circuit apparently believed that it had authority to reapportion fault itself rather than remand the case to the District Court for a redetermination of fault because (1) "on the facts of this case, no reasonable trier of fact could apportion more than two-thirds of the liability to National Gypsum," (2) "the trier of fact displayed a willingness to apportion at least this much of the award to National Gypsum," and (3) its decision "merely confine[d] the decision of the district judge to the upper limit of his discretion." [12a-13a]

The rationale stated by the Seventh Circuit does not withstand either legal or logical scrutiny. Although it cited no authority in support of its rationale, the Seventh Circuit's statements are an apparent reference to cases where an appellate court appropriately may exercise its authority to reduce or increase damages awarded by a district court.[6] The Seventh Circuit apparently relied upon that authority, although in this case damages had not yet been tried.

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[6] Since this Court adopted the pure comparative negligence rule in admiralty in *United States v Reliable Transfer,* 421 U.S. 397 (1975), only one other federal circuit court has reapportioned fault on appeal, *Hellenic Lines Ltd. v. Prudential Lines, Inc.,* 813 F.2d 634 (4th Cir. 1987). In all other cases, the appellate courts either affirmed the apportionment of fault or, if they found it to be in error, remanded the case to the district court to reapportion fault. Abston and Kunz, *Collision Survey 1988: Survey of Reported Collision Decisions in the Federal Courts,* 13 Tul. Mar. L.J. 355 (1989).

In *Hellenic Lines,* the Fourth Circuit reversed the district court's allocation of fault and reapportioned fault on appeal. The decision does not provide well-reasoned precedent for the Seventh Circuit's decision because the Fourth Circuit in reapportioning fault relied upon its authority to decrease or increase the amount of damages awarded by the trial court. *Id.* at 638. As pointed out in this petition, the appellate authority to decrease or increase damages does not legally or logically include the authority to apportion fault on appeal. *See infra* pp. 20-22. Of particular significance is the Fourth Circuit's misplaced reliance upon *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 516 F.2d 172 (2d Cir. 1975) (*en banc*), *rev'd on other grounds,* 430 U.S. 1, *reh'g denied,* 430 U.S. 976 (1976). In that case the Second Circuit held that it had the authority to modify the judgment to increase the award of compensatory damages because (1) the critical evidence was largely documentary, *id.* at 186, and (2) the court could do so without having to evaluate the testimony of witnesses. *Id.* at 186 n.16. Neither justification cited by the Fourth Circuit applies in this case because (1) Rule 52(a) was amended after *Chris-Craft Industries* was decided, thereafter providing that findings of fact based upon documentary evidence must be reviewed in accordance with the same "clearly erroneous" standard applied to findings of fact based upon oral testimony, and (2) the Seventh Circuit in this case, unlike the Fourth Circuit in *Chris-Craft Industries,* had to evaluate oral testimony, rather than documentary evidence, to apportion fault.

The authority of federal appellate courts to decrease the amount of damages awarded below does not include the authority to apportion fault because apportionment of fault is a question of fact, whereas the question of whether damages are excessive is a question of law. *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961); *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2820 (1973). Because of this, an appellate court that concludes that damages awarded by a trial judge are excessive cannot exercise its independent judgment and reduce the award to a level it believes to be appropriate, but can only reduce the damages to a level that would not have mandated reversal had the trial court awarded that amount of damages originally. *Petition of United States Steel Corp.*, 479 F.2d 489, 501 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973). The reduction permitted is not the result of a reweighing of the evidence, but the result of the court's legal conclusion that the awarding of the "excessive" portion of damages was erroneous. That portion of the damage award found not to be legally excessive is a finding of fact of the lower court, not the appellate court.

In this case, the Seventh Circuit's finding of 33¹/₃ percent fault against the City has no basis in the findings of the District Court. The District Court apportioned fault 96/4 and the appellate court 66²/₃/33¹/₃. Although the District Court displayed a willingness to apportion at least 66²/₃ percent against National Gypsum [because 96 is greater than 66²/₃], the District Court did not display a similar willingness to apportion 33¹/₃ percent against the City. The additional 29 percent of fault attributed to the

City by the Seventh Circuit was a finding of fact made by the appellate court alone. The Seventh Circuit's conclusion that $33^1/_3$ percent against the City represents the upper limit of the court's discretion is not rooted in, or in any way supported by, the finding of 4 percent made by the District Court. Reapportionment of fault on appeal, unlike the reduction of damages found to be excessive, by its very nature creates a gap between the degree of fault found below and the degree of fault found on appeal in reference to one of the parties, in this case, the City.

In spite of the statement by the Seventh Circuit that "no reasonable trier of fact could apportion more than two-thirds of the liability to National Gypsum," it cannot be seriously argued that the Seventh Circuit's allocation is the only allocation permitted by the record. Had the District Court apportioned fault 90/10, or 85/15, or 80/20, it is doubtful that the Seventh Circuit would have found the District Court's apportionment clearly erroneous based upon the reasons the Seventh Circuit stated in its decision. To state that no reasonable trier of fact could apportion fault differently than the appellate court did in this case is simply to find facts under the rubric of a conclusion of law and to ascribe to the process of apportioning fault a degree of precision that does not exist. In certain circumstances, a record does compel one conclusion only. For example, if an appellate court concludes that a finding of discrimination is clearly erroneous, then a finding of no discrimination logically follows, and it is of little consequence if the judgment is entered by the appellate court or the district court. Apparently, it is the Seventh Circuit's position that $66^2/_3$ $/33^1/_3$ is the opposite of 96/4 as a matter of law.

The rationale employed to permit appellate courts to increase damages under limited circumstances is equally inapplicable to the reapportionment of fault. When appellate courts have increased damages, they have done so only when they were certain that they were not undermining the integrity of the trial process. For example, in *Simpson v. United States*, 322 F.2d 688 (5th Cir. 1963), the court increased the damages when it found that "there are firm guidelines establishing the basic elements of the award and it can be computed with some degree of certainty as easily by the appellate court as by the trial judge . . . " *Id.* at 693. In *Dale Benz, Inc. Contractors v. American Casualty Co.*, 303 F.2d 80 (9th Cir. 1962), the court increased the damages where it was "in as good a position to determine the issues involved on the record before us as would be the trial judge on remand," and the "issues arise out of and are concerned with figures and arithmetical calculations." *Id.* at 82. In *Felder v. United States*, 543 F.2d 657, 671 (9th Cir. 1976), the court confined its modification to a recalculation of damages under circumstances where most of the changes made involved arithmetic calculations that the appellate court could perform as easily as the trial court.

A finding apportioning fault, unlike a damage award, has no quantifiable component readily subject to recalculation, but is dependent upon the application of law to facts which are as rich and diverse as human experience. This exercise of judgment is more accurately done by the trier of fact because "[c]old records rarely reflect the look, the touch or the feel of the witness. . . . " *Mitchell v. Evelyn C. Brown, Inc.*, 310 F.2d 420, 425 (1st Cir. 1962).

B. The Seventh Circuit's Decision Deprives the Petitioner of an Appeal as a Matter of Right.

The most dire consequence of an appellate court engaging in fact-finding is that the regular appellate process is so reordered as to deprive litigants of their ordinary right to have findings of fact reviewed by an appellate court. In this case, the City chose not to appeal the District Court's findings of four percent fault against it because of the relatively small cost of the decision. Had the District Court, however, found the City to be one-third at fault, the City, facing the specter of a multimillion dollar judgment, would have appealed the finding of liability and the apportionment to the Seventh Circuit.

When an appellate court makes an erroneous finding of fact on appeal, the party against whom the facts are found is left with no appeal as a matter of right. A party's only recourse is to attempt to convince this Court to accept its petition for a writ of certiorari. A petition, however, is not a certain remedy because it is not an appeal as a matter of right. It is a difficult task to persuade this Court to accept a petition solely to review facts found by the appellate court because this Court, the supreme interpreter of the law and the Constitution, is not easily fettered to the petty detail of factfinding. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

It cannot be argued that no further appeal is needed because the facts were found in the course of appellate review. Facts found on appeal are not based upon the testimony itself, but upon the record of the testimony, a sterilized version of a trial, cleansed of all nuance and subtlety. This Court has noted that such a record does not provide an accurate basis for fact finding. *Anderson,* 470 U.S. at 574-75. The appeal is further limited by the standard of review – in this case the "clearly erroneous" standard. Neither party presents the appeal to the court in the same manner as the case was presented to the trial court. Rather, their energies and arguments are directed to persuading the court that the appeal should be decided one way or another based upon the standard of review. Such argument, by its nature, omits the nuanced analysis of testimony and exhibits that characterizes post-trial argument and briefing.[7]

The Seventh Circuit, by appropriating the role of fact finder from the District Court, has left the City with no remedy unless this Court grants the petition to review in this case.

II. The "Cost of Avoidance" Standard for Apportioning Fault in an Admiralty Case Formulated by the Seventh Circuit is Inconsistent with *United States v. Reliable Transfer* and Numerous Circuit Court Decisions that have Apportioned Fault Without Reference to the Cost of Avoidance.

The Seventh Circuit has formulated a new standard by which to apportion fault in maritime collision and allision cases. The new standard – cost of avoidance – is inconsistent with this Court's decision in *United States v. Reliable Transfer,* 421 U.S. 397 (1975), and numerous circuit court decisions which have apportioned fault without reference to "cost of avoidance." Moreover, apportioning fault based upon "cost of avoidance" is illogical and will interject uncertainty into an area of the law that routinely involves large damages.

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[7] Requiring litigants to persuade an appellate court in the same fashion as a trial court has been described by this Court as "requiring too much." *Anderson,* 470 U.S. at 575.

In *Reliable Transfer,* this Court held "that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . . " Under this standard, fault is apportioned in accordance with the relative culpability of the parties. *Harbor Tug & Barge, Inc. v. Belcher Towing Co.,* 733 F.2d 823, 825 (11th Cir. 1984); *Gele v. Wilson,* 616 F.2d 146, 148 (5th Cir. 1980).

Numerous federal appellate courts have reviewed apportionments of fault by district courts without any reference to or consideration of the cost of avoidance. *See, e.g., Inland Oil and Transport Co. v. Ark-White Towing Co.,* 696 F.2d 321 (5th Cir. 1983); *Complaint of Interstate Towing Co.,* 717 F.2d 752 (2d Cir. 1983); *Getty Oil Co. (Eastern Operations), Inc. v. SS Ponce DeLeon,* 555 F.2d 328, 335 (2d Cir. 1977); *Portacci v. Moran Towing & Transport Co.,* 615 F.2d 293 (5th Cir. 1980); *Allied Chemical Corp. v. Hess Tankship Co. of Delaware,* 661 F.2d 1044, 1057 (5th Cir. 1981). In addition, numerous district courts have allocated fault or reviewed allocations of fault by juries in admiralty cases without reference to or consideration of the "cost of avoidance." *Red Star Towing & Transport Co., Inc. v. "Ming Giant",* 552 F.Supp. 367 (S.D. N.Y. 1983); *Complaint of Flota Mercante Grancolombiana, S.A.,* 440 F.Supp. 704, 726 (S.D. N.Y. 1977); *Bremmer v. Shedd,* 467 F.Supp. 261, 267 (W.D. Pa. 1979); *Afran Transport Co. v. S/T Maria Venizelos,* 450 F.Supp. 621, 623 (E.D. Pa. 1978); *Complaint of B.F.T. No. Two Corp.,* 433 F.Supp. 854, 875 (E.D. Pa.

1977). No federal court has used the "cost of avoidance" standard advocated by the Seventh Circuit in apportioning fault in an admiralty case. Abston and Kunz, *Collision Survey 1988: Survey of Reported Collision Decisions in the Federal Courts,* 13 Tul. Mar. L.J. 355 (1989) (compiling federal collision and allision decisions reported within the last fifteen years).

In *Reliable Transfer,* this Court noted that prior to the decision in that case, the United States was virtually alone among the world's major maritime nations not to adhere to the Brussels Collision Liability Convention of 1910 that provides for the apportionment of damages on the basis of degree of fault whenever it is possible to do so.[8] This Court noted in deciding *Reliable Transfer* that the fact that the United States did not adhere to the convention rule had encouraged trans-Atlantic forum shopping. *Id.* at 404.

"Cost of avoidance" is a standard quite different from culpability. The former is an economic standard which can be measured and compared. The latter reflects the judge or jury's considered judgment as to the quality and gravity of each party's negligence. Adoption of the "cost of avoidance" standard in the United States would once again create in the United States a rule for apportioning fault significantly different from the rule throughout most of the world and would risk the reintroduction of the forum shopping this Court sought to end in *Reliable Transfer.*

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[8] Article 4 of the Brussels Collision Liability Convention of 1910 provides in part: "If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally." *United States v. Reliable Transfer,* 421 U.S. 397, 403 n.6; 6 M. Cohen, *Benedict on Admiralty* Doc. No. 3-2 (rev. 7th ed. 1990).

The precept that the burden of precaution or, to restate it in economic terms as did the Seventh Circuit, the "cost of avoidance" is to be considered in deciding whether a party's conduct was negligent was suggested by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Under the "Hand formula," i.e., $B < P \times L$, a party would be negligent if the burden of precaution (B) were less than the probability of harm (P), multiplied or discounted by the gravity of the injury (L). The "Hand formula," however, was suggested as a means of assisting courts in determining whether action or inaction constituted negligence. The Seventh Circuit, in *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982), approved the use of the "Hand formula" to determine whether conduct was negligent, but, even in that limited context, did so with the caveat that it was not holding that courts must use the "Hand formula" to determine negligence in all maritime cases.

The "cost of avoidance" standard, although a useful concept in deciding whether or not a party's conduct was negligent, cannot logically be applied to apportioning fault, because in many cases the cost of avoidance has nothing to do with culpability. Many casualties might have been avoided had the parties involved been more alert, in which case the cost of avoidance could have been equal. The measure of a party's culpability, however, depends upon the extent of their legal duty. *Bunge Co. v.*

M/V Furness Bridge, 558 F.2d 790, 799 (5th Cir. 1977), *cert. denied* 435 U.S. 924; *Trade Banner Lines v. Caribbean Steamship Co.*, 521 F.2d 229, 230 (5th Cir. 1975); *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 84 (5th Cir. 1960). The contradiction in the two concepts is illustrated in this case. The Seventh Circuit, one page after it announced the concept, was compelled to limit its application because of the disparity between the legal responsibilities of the captain as compared to the wharfinger for the welfare of the ship.

When the concept of "cost of avoidance" is used in conjunction with the "Hand formula" to determine if a party's conduct was negligent, the concept provides a helpful tool because of the comparative relationship established: $B < P \times L$. No similar comparative relationship is established when the concept is applied to apportioning fault because the "Hand formula" gives no guidance to comparing one party's "cost of avoidance" with another. For example, if the cost of avoidance to one party is $5,000 and the cost to the other is $15,000, and P x L is $5,000,000, is the cost of avoidance for both parties equally low, indicating fault should be apportioned 50/50, or is $15,000 high and $5,000 low, requiring allocation of 85/15, or should the costs simply be compared with each other, and fault allocated 75/25? Obviously, none of these considerations resolve the issue of the culpabilities of the parties.

The introduction of the cost of avoidance standard raises the question of how this cost is to be measured. This case does not provide a good illustration of how to measure the cost because neither party was aware that this standard would ultimately be applied to apportion fault in this case, and therefore neither party put into the record evidence concerning the cost of avoidance. The Seventh Circuit assumed the cost of avoidance to be the same because it concluded that more forthrightness, both on the part of the captain and the City's dock superintendent, might have prevented the casualty. Had the parties submitted evidence on this issue, the record would not have supported the Seventh Circuit's conclusion.[9]

Everyday in the United States judges and juries apportion fault on the basis of culpability without any great difficulty. The concept of culpability, although difficult to articulate in abstract terms, is not difficult to apply because it is a concept rooted in the common experience of human life. To introduce the concept of "cost of avoidance" into allocating fault in maritime cases will once again place the United States out-of-step with the world's major maritime powers. It is not only illogical, because it is inconsistent with culpability, but also will add needless confusion to an area of the law that is well settled without any assurance that it will result in more just apportionments of fault.

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[9] The cost of avoidance from the City's perspective would have been much greater than that concluded by the Seventh Circuit. If the City, to avoid a casualty, is required to direct captains of vessels where to moor their ship, how to tie it up and man it, how to monitor the weather and maintain ship-to-shore communications, the City would have to employ a person who is qualified to make those decisions. The City would have to hire a port captain who was licensed to navigate and dock ships on the Great Lakes. The port captain would have to meet with the captain of the vessel and ascertain the make up and health of the ship's crew, the capabilities and mechanical condition of the ship, the nature of its cargo and its plans. The port captain would then have to review with the ship's captain all of this information and tell the captain, from the port's point of view, where and how he should dock his vessel. The cost of doing this, of course, would be considerably higher than the cost of the City's dock superintendent being more forthright. For National Gypsum, there would be no additional cost because it has already incurred the cost of employing a captain to make these decisions. If that were the state of the record, one must ask, how would the damages be apportioned? If the cost to the City of employing a port captain were $80,000 per year, and the cost to National Gypsum to maintain the same level of knowledge was zero, would any fault be attributed to the City?

CONCLUSION

For these reasons, the petitioner respectfully requests the Court to grant the petition.

Respectfully submitted,

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February 14, 1991

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-2631

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INCORPORATED, NEW YORK MARINE MANAGERS, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 80 C 1001 – THOMAS J. CURRAN, *Judge.*

ARGUED APRIL 13, 1990 – DECIDED OCTOBER 16, 1990

Before CUDAHY, POSNER and FLAUM, *Circuit Judges.*

CUDAHY, *Circuit Judge.* In a heavy storm on Christmas Eve of 1979, the SS EM FORD, a self-unloading bulk cement carrier loaded with 5,700 tons of bulk cement, tore loose from its moorings, battered against the headwall of its berth and eventually sank to the bottom of the Milwaukee Harbor. Following this disaster, the FORD's owner, the Cement Division of the National Gypsum Company, along with the hull and cargo insurers of the ship, [referred to collectively as "National Gypsum"] sued the City of Milwaukee in admiralty. National Gypsum claimed that the City had breached its obligations as a wharfinger by assigning the FORD to a slip it knew to be unsafe in heavy winds and by negligently failing to warn National Gypsum of the hidden dangers in the berthing slip it assigned to the FORD. National Gypsum sought over $6,500,000 in compensatory damages. The City of Milwaukee denied fault and alleged contributory negligence on the part of National Gypsum, seeking to recover $250,000 for damage caused to its dockwall and other property by the FORD's battering during the Christmas Eve storm.

After a motion by the City, the district court disqualified National Gypsum's original attorney and his law firm because of potential conflicts. At a bifurcated trial on the issue of liability, the district court found National Gypsum to be 96% negligent and the City to be 4% negligent. This interlocutory appeal in admiralty followed under 28 U.S.C. section 1292(a)(3). Damages are to be determined later. We reverse the district court's allocation of fault and find that we lack jurisdiction, at this time, to review the district court's disqualification order.

I. FACTS

Our tale begins on November 15, 1979, when National Gypsum's Fleet Captain, Eugene P. Stafford, telephoned Stanley Blawas, an Assistant Dock Superintendent of the Milwaukee Harbor, requesting a winter lay-up berth for the FORD. Assistant Dock Superintendent Blawas offered the FORD a berth at Terminal No. 4 in South Slip No. 3 in Milwaukee's outer harbor. Captain Stafford inquired about the safety of the slip before accepting the berth, but was assured by Blawas that the berth was safe.

Before it had a chance to berth at Terminal No. 4, National Gypsum changed the FORD's winter mooring orders. Instead of mooring at Terminal No. 4 in the outer harbor, the FORD was ordered to wait in the harbor for its sister ship and then dock at National Gypsum's own terminal in Milwaukee's inner harbor. After being apprised of the change in the FORD's plans, Assistant Dock Superintendent Blawas offered to let the FORD tie up temporarily at Terminal Pier No. 1 in South Slip No. 1 in the outer harbor while the FORD was waiting for its sister ship. Before accepting the offer of South Slip No. 1, Patrick Gallagher, captain of the FORD, asked Blawas about the depth of the water in the slip and about the availability of electric power. He did not ask about the safety of South Slip No. 1.

After accepting the berth, Captain Gallagher consulted the 1979 *United States Coast Pilot* to see what it had to say about the harbor. This maritime source contained no warnings of hazardous wave surges in Milwaukee's outer harbor, but did note that the breakwater in the harbor could be obscured during heavy waves. From 1912 to 1966 (some 13 years before the sinking of the FORD), one of the appellants, the Great Lakes Protective Association, published the winter mooring regulations of the United States Salvage Association in its annual reports. These regulations provided that winter mooring would not be approved in Milwaukee's outer harbor because of the danger of wave surges from northeasterly winds. The district court found that National Gypsum was aware of these mooring regulations. In addition, Marine surveyor William Wade testified that he had informed National

Gypsum in December of 1979 that ships berthed in Milwaukee's outer harbor were subject to heavy surges during storms with strong northeasterly winds. National Gypsum denies that it received this warning. The district court found otherwise.

The FORD's captain, although quite experienced, had never seen or apparently heard of dangerous wave surges in Milwaukee's outer harbor. The district court thought that the possibility of wave surges could have been predicted from the construction of the berth and from the captain's previous experience mooring in other harbors. It is clear from previous claims and from records of wave heights kept by the City, however, that the City had actual knowledge that mooring in the outer harbor – especially in South Slip No. 1 – was unsafe during heavy storms. Despite this knowledge, the City failed to warn either the crew of the FORD or National Gypsum of any possible danger to the FORD.

Before long, National Gypsum was to change the FORD's orders for the last time. National Gypsum commanded the FORD, which was already berthed in South Slip No. 1, to remain in Milwaukee over the Christmas holiday and then make one more cement delivery before mooring at Milwaukee for the winter. The FORD's winter mooring lines were put out to secure the ship while the crew was on vacation.

At a meeting on the FORD on the morning of December 22, 1979, Captain Gallagher informed Assistant Dock Superintendent Blawas that the ship would be laying up for the holiday and that most of the crew would be gone until December 26th or 27th, but that a skeleton crew would be left aboard the FORD during the interim. Blawas warned Captain Gallagher that waves in the outer harbor could "get a little rough" if a storm came up. By "rough," Blawas testified that he meant waves of two to four feet. (Blawas conceded, however, that it was possible he had actually undercut this warning by specifying waves of one to two feet. Appellant's Appendix at 152-53.) Later that same day, Captain Gallagher discharged all but five of the crew for the holidays. In accordance with National Gypsum's practice while in port and with the City's practice on holidays, no one was assigned to watch the weather. And no one had the key to the ship's radio or telephone. Captain Gallagher expected the remaining crew to use a nearby pay phone in case of an emergency. An independent company was retained on call to provide extra manpower and materials as needed.

By December 24, 1979, a heavy storm had developed. Waves of up to 15 feet crashed into South Slip No. 1. At approximately 1 p.m. on that day, one of the FORD's remaining crew members realized that the FORD was from 10 to 15 feet off the dock at the stern and that the FORD was in danger. The crew called for help. The Coast Guard was contacted (but no one was available to render assistance because of the holiday). In addition, tugboats came out to assist the FORD on three different occasions, to no avail. The tugboats were unable to help the FORD because they could not communicate with it and because it had no pilot on board. Because of the severe waves, the FORD tore lose [sic] from its moorings, started pounding against the headwall of the dock, became dangerous to those trying to save it and was eventually abandoned. The FORD ultimately sank.

National Gypsum brought suit against the City of Milwaukee, claiming that the City had breached its obligations as a wharfinger by assigning the FORD to a slip it knew to be unsafe in heavy winds and by negligently failing to warn National Gypsum of the hidden dangers in the berthing slip it assigned to the FORD. National Gypsum asked for over $6,500,000 in compensatory damages. The City of Milwaukee denied fault and alleged contributory negligence on the part of National Gypsum, seeking to recover $250,000 for damage caused to its dockwall and other property by the FORD's battering during the Christmas Eve storm.

After a motion by the City, the district court disqualified National Gypsum's original attorney and his law firm because of potential conflicts. After the liability phase of a bifurcated trial, the district court found that National Gypsum was negligent and at fault: for laying up the FORD at South Slip No. 1, for failing to employ or retain a standby master or pilot and crew members aboard who could navigate the vessel, for failing to maintain ship-to-shore radio-telephone communications and for failing to monitor the weather. The district court found the City negligent and at fault: for allowing the vessel to temporarily lay up at South Slip No. 1, for failing to warn the ship that wind and wave conditions could develop which would endanger the vessel and the City's dockwall and for failing to order that the ship remain manned or move off the berth. The district court also found that the City had breached a wharfinger's implied warranty of offering safe berths. The court apportioned 96% of the fault to National Gypsum and 4%

to the City, a ruling which essentially left both parties to bear their own losses.

On appeal, National Gypsum argues essentially that: (1) the district court erred in not finding the City 50% at fault because the City's actions constituted either wanton negligence or negligence greater than 4%; and (2) that the district court's ruling disqualifying National Gypsum's original attorney and his law firm was clearly erroneous. The City has not cross-appealed. We find that we do not have jurisdiction to review the district court's disqualification order, but reverse the district court's allocation of fault.

II. Discussion

A. *Pendent Appellate Jurisdiction over the Disqualification Order*

The first issue before us is whether this court has jurisdiction to hear an appeal from the district court's disqualification order. Normally, interlocutory orders are not appealable. 28 U.S.C. section 1292(a)(3), however, empowers us to hear "[i]nterlocutory decrees of [] district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

National Gypsum contends that we have statutory jurisdiction to review the merits of the district court's disqualification order (1) because the disqualification order is a final order with respect to the issue of liability and apportionment of fault between the parties or (2) because the disqualification order is an adverse determination on the substantive right of National Gypsum to be represented by the counsel of its choice. Despite National Gypsum's arguments to the contrary, it is clear that this court does not have statutory jurisdiction to hear an appeal from the district court's disqualification order. The order does not "determin[e] the rights and liabilities of the *parties*." (emphasis supplied) Rather, it merely disqualifies National Gypsum's original lawyer and his law firm. The district court's order apportioning liability between National Gypsum and the City of Milwaukee, on the other hand, is an appealable interlocutory order in admiralty.

This court does have the ability to review some interlocutory orders – even though it may lack the statutory jurisdiction to do so – under the doctrine of pendent appellate jurisdiction. Under this doctrine, "an order not itself appealable, but closely connected to an order that is appealable, may be reviewed as a pendant [sic] to the latter order." *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988). The doctrine is very limited in scope since an expansive application of the pendent appellate jurisdiction doctrine would severely undercut the purposes behind the final judgment rule. *Id.* Hence, we have held that "[w]hen an ordinarily unappealable interlocutory order is *inextricably entwined* with an appealable [] order, the former may be reviewed at the same time *if, but only if,* there are *compelling reasons* for not deferring the appeal of the former order to the end of the lawsuit, at which time all previous orders are appealable together with the final judgment." *Illinois ex rel. Hartigan v. Peters*, 861 F.2d 164, 166 (7th Cir. 1988) (emphasis supplied).

We find that the requisite "compelling reasons" are absent in this case. The district court's disqualification order is not "inextricably entwined" with the district court's allocation of fault. Indeed, the two issues are actually unrelated (although the court's ruling on the former may have had some effect upon the latter).

National Gypsum contends, however, that it is in the "best interests of justice" to review the district court's disqualification order now, at the conclusion of the liability phase. (If the disqualification order were reversed after the damages phase is completed and a final judgment entered, the whole case would presumably have to be retried.) We do not find National Gypsum's judicial economy argument, in this context, to be persuasive. An erroneous evidentiary ruling may persuade a litigant to waive a (fundamental) constitutional right, but the evidentiary ruling cannot normally be appealed until there has been a final judgment. If the ruling were erroneous and the error prejudicial, much judicial effort would probably have been wasted. But, the final judgment rule prevails, nevertheless. In short, we see no special reason why we should depart from the normal final judgment rule or expand the doctrine of pendent appellate jurisdiction (and undercut the final judgment rule) to fit this situation.

B. The Allocation of Fault

In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975), the Supreme Court held that "when two or more parties have contributed by their fault to cause property damage in a maritime collision . . . , liability for such damages is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault." This rule provides the backdrop we must use to analyze this case.

Our standard of review is well settled. This court may not set aside the judgment of a district court sitting in admiralty unless that judgment is found to be clearly erroneous. *McAllister v. United States,* 348 U.S. 19, 20 (1954). The clearly erroneous standard of review applies to an admiralty court's apportionment of fault in accordance with comparative negligence principles in collision cases. *See, e.g., Barnett v. Sea Land Services, Inc.,* 875 F.2d 741, 745 (9th Cir. 1989). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.,* 333 U.S. 364, 395 (1948).

We think that the district court's thorough and largely well reasoned opinion in this case is basically correct. Our review of the record leads us to the conclusion that the district court was right when it found both National Gypsum and the City of Milwaukee to be at fault in the sinking of the FORD on that fateful Christmas Eve. Moreover, we think it clear, as did the district court, that the fault of National Gypsum was more egregious than the fault of the City. We must, however, take issue with the district court's allocation of fault in this case.

The district court held Cement Division to be 96% at fault and the City to be 4% at fault. These numbers are odd. It appears that the district court apportioned liability according to the amount of property each side had at risk. Memorandum Opinion and Order of June 30, 1989, at 134 ("The plaintiffs also had the costlier property at risk with the foreseeable result being that the damages claimed by the plaintiff are twenty-six times as great as those claimed by the defendant."). Hence, the 96% and 4% figures (25/26=.9615). These calculations, however they were arrived at, have left us with a "definite and firm conviction that a mistake has been committed."

Under the doctrine of comparative negligence, a party's share of liability should not depend upon how valuable his property at risk was. But, this is what the district court appears to have done in this case. Instead, the doctrine of comparative negligence is generally supposed to be used to assess liability in proportion to the cost of avoiding the entire accident to each side. Because the district court's allocation of fault was based upon an incorrect application of comparative negligence principles or because the district court failed to adequately explain how it arrived at its result, we cannot accept its apportionment of liability.

Although we could remand the case for a redetermination of fault, we need not do so. We believe that, on the facts of this case, no reasonable trier of fact could apportion more than two-thirds of the liability to National Gypsum.

With respect to information about the danger to the FORD, it seems clear that Assistant Dock Superintendent Blawas had more detailed and specific information about the wave conditions in the harbor than did Captain Gallagher. It would have been relatively costless for Blawas to have been more forthright about the wave conditions in the slip. It would also have been relatively costless for Blawas to ask more searching questions regarding Captain Gallagher's lay-up plans for the FORD. On the other hand, it would have been relatively costless for Captain Gallagher to have undertaken at least some investigation on his own or to have more closely questioned Blawas's assurances.

Once the FORD was berthed and laid-up, however, National Gypsum was really the only party that could have undertaken some effort to keep the FORD from danger. Captain Gallagher could, for example, have left the radio-telephone in operation or he could have left a competent master aboard to move the vessel in case danger arose. Neither of these precautions would have been very costly. (The City could have ordered the FORD to move once the storm came up, but without adequate manpower, such a directive would have rung hollow.) We think that there is great wisdom in the view that a captain is ultimately responsible for the welfare of his ship. Because Captain Gallagher's actions essentially left the FORD a sitting duck, National Gypsum must bear more of the ultimate fault for the FORD's demise than the City. *See Boudoin v. J. Ray McDermott & Company,* 281 F.2d 81, 84-85 (5th Cir. 1960). Because of the distribution of the cost of avoidance in this case, no reasonable trier of fact could apportion more than two-thirds of the liability to National Gypsum. Through the judgment below, the trier of fact displayed a willingness to apportion at least this much of the award to National Gypsum. In deciding the case as we do, we therefore merely confine the decision of the district judge to the upper limit of his discretion and apportion liability two-thirds to National Gypsum and one-third to the City of Milwaukee.

III. CONCLUSION

For all the foregoing reasons, the appeal from the district court's disqualification order is DISMISSED for lack of jurisdiction. The district court's allocation of fault is REVERSED. National Gypsum is adjudged to be two-thirds at fault while the City of Milwaukee is adjudged to be one-third at fault for the damage to the City's property and for the sinking of the SS EM FORD. May she rest in peace.

A true Copy:

Teste:

Clerk of the United
States Court of Appeals
for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 16, 1990

BEFORE: Honorable Richard D. Cudahy,
Circuit Judge

Honorable Richard A. Posner,
Circuit Judge

Honorable Joel M. Flaum,
Circuit Judge

No. 89-2631

CEMENT DIVISON [sic], NATIONAL GYPSUM COMPANY,
REED & BROWN, INCORPORATED, et al.,
Plaintiffs-Appellants

v.

CITY OF MILWAUKEE,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 80 C 1001, Judge Thomas J. Curran

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is hereby, REVERSED, with costs, as to the allocation of fault, and DISMISSED, as to the district court's disqualification order as this Court lacks jursidiction [sic], in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CEMENT DIVISION, NATIONAL
GYPSUM COMPANY; REED &
BROWN, INC., NEW YORK
MARINE MANAGERS, INC.,
ALLSTATE INSURANCE
COMPANY, c/o American Marine
Underwriters, Inc., HIGHLANDS
INSURANCE COMPANY,
EMPLOYERS CASUALTY
COMPANY OF TEXAS, c/o Texas
Marine Underwriters Agency, Inc.,
DONALD H. MILLER, INC., U.S.
FIDELITY AND GUARANTEE
COMPANY, GREAT LAKES
PROTECTIVE ASSOCIATION, THE
ATLANTIC COMPANIES, LLOYDS
UNDERWRITERS, INSTITUTE
COMPANIES, including:
COMMERCIAL UNION
ASSURANCE CO. LTD. "I: A/o
ANDREW WEIR INSURANCE CO.
LTD., ENGLISH & AMERICAN
INSURANCE CO. LTD. "M" 1
A/o., ORION INSURANCE CO.
LTD. "T" A/o., YASUDA FIRE &
MARINE INSURANCE CO. (U.K.)
LTD. "T" A/o., ATLAS
ASSURANCE CO. LTD., "T" A/o.,
PHOENIX ASSURANCE CO. LTD.,
BRITISH LAW INSURANCE CO.
LTD., ROAD TRANSPORT AND
GENERAL INSURANCE CO. LTD.,
INSURANCE COMPANY OF
NORTH AMERICA (U.K.) LTD.
"G" A/o., INSURANCE
COMPANY OF NORTH AMERICA
(U.K.) LTD. "O" A/o., HOME

INSURANCE CO. LTD. "X" A/o.,
LONDON & HULL MARITIME
INSURANCE CO. LTD.,
HANOVER INSURANCE CO.
LTD., SPHERE INSURANCE CO.
LTD., DRAKE INSURANCE CO.
LTD., BISHOPSGATE INSURANCE
CO. LTD. "F" A/o., BRITISH LAW
INSURANCE CO. LTD. NO. 2
A/o., MINSTER INSURANCE CO.
LTD. NO. 2 A/o., INSURANCE
CORPORATION OF IRELAND "L"
A/o., FOLKSAM
INTERNATIONAL INSURANCE
CO. (U.K.) LTD., TERRA NOVA
INSURANCE CO. LTD. per
ANDREW DRYSDALE LTD.,
ECONOMIC INSURANCE CO.
LTD. "GENERAL" A/o., c/o
Willis, Faber & Dumas Ltd., Ten
Trinity Square, London EC3P 3AX
England,

Plaintiffs,

Case No.
80-C-1001

v.

CITY OF MILWAUKEE,

Defendant and
Third-Party Plaintiff,

v.

EDWARD E. GILLEN COMPANY,
a corporation, and GREAT
LAKES TOWING COMPANY,
a corporation,

Third-Party Defendants.

MEMORANDUM OF DECISION AND ORDER

On Christmas Eve in 1979, the S.S. E.M. FORD, loaded with 5,700 tons of bulk cement, tore loose from her moorings, battered against the headwall of the dock in the Milwaukee (Wisconsin) Harbor, and began to take on water through the breaks in her hull. The next morning the vessel sank to the bottom of the slip. Following this disaster the shipowner, the Cement Division of the National Gypsum Company, Inc., along with thirty-two of its insurers and marine underwriters, commenced this action in admiralty, *see* Federal Rule of Civil Procedure 9(h), claiming that the City of Milwaukee, while acting as a wharfinger, breached express and implied warranties to provide a safe berth and negligently failed to warn of hidden dangers in the berthing slip. In its Amended Complaint Cement Division seeks $6,500,000.00 in compensatory damages for raising and refloating the vessel, for removing the hardened cement cargo from its holds, for loss of the cargo, and for repairing and refurbishing the E.M. FORD.

The City of Milwaukee answered, denying liability and asserting a counterclaim against the plaintiff. The City alleges that the collision[1] between the E.M. FORD

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[1] In this case the vessel struck the dock, so the impact is properly called an "allision" rather than a "collision." *See Weyerhaeuser Company v. ATROPOS ISLAND*, 777 F.2d 1344, 1346 n.1 (9th Cir. 1985) ("An allision is a collision between a moving vessel and a stationary object."). However, under admiralty jurisdiction, the term "collision" is used in its broadest sense to encompass every case where a vessel strikes

(Continued on following page)

and Milwaukee's dock wall was caused by the negligence of the plaintiff in leaving the S.S. E.M. FORD improperly moored and improperly supervised, manned and equipped. The City is demanding $250,000.00 for damage to its dock and other property. The City also filed a third-party complaint in admiralty against the Edward E. Gillen Company, a marine contracting corporation, and against the Great Lakes Towing Company, a corporation engaged in the business of providing tugboat services in the Milwaukee Harbor. *See* Federal Rule of Civil Procedure 14(c).[2] The third-party complaint alleges that

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(Continued from previous page)

another vessel or some object afloat or not. *See* Admiralty Jurisdiction Extension Act, 46 U.S.C. § 740. *See also People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1523 (W.D. Pa. 1985). Therefore, the term "collision" can apply to the allision at issue in this case.

[2] Federal Rule of Civil Procedure 14(c) provides as follows:

> When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party defendant, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Gillen is wholly or partly liable for the damage to the E.M. FORD because it failed to provide safe mooring for the vessel and that Great Lakes Towing Company is wholly or partly liable because it failed to provide towing services necessary to remove the E.M. FORD from its perilous position in its slip to a safe and secure location. Gillen answered denying all liability. But on the third day of trial Gillen and the plaintiffs entered into a settlement which was later approved by the court.[3] Great Lakes Towing did not file a responsive pleading and the City voluntarily dismissed its third-party claims against Great Lakes Towing pursuant to Federal Rule of Civil Procedure 41(a).[4] *See* Notice of Dismissal of the Great Lakes Towing Company (filed March 16, 1982).

After the completion of extensive discovery and an attempt by the plaintiffs to appeal a collateral order disqualifying one of their counsel, a trial to the court commenced. By agreement of the parties the trial was bifurcated and only the liability issues were heard during this first phase. *See* Federal Rule of Civil Procedure 42(b).

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[3] Under the terms of this settlement the plaintiffs were to give to Gillen and its insurer a release and indemnification agreement. *See* Order of Dismissal as to Third-Party Defendant, Edward E. Gillen Company, Nunc Pro Tunc (filed February 12, 1986).

[4] At trial, the parties presented no evidence establishing that the Great Lakes Towing Company is liable for any of the damage caused to the vessel or the City's property. Therefore, the court has not included Great Lakes Towing in the comparison of fault.

The first phase of the trial proceeded for fourteen trial days during which twenty-eight witnesses were called. In order of appearance they were:

1. *ROBERT BRISSETTE*:

   called by plaintiffs; employee of Cement Division; First Mate on E.M. FORD in 1979

2. *RICHARD G. BURR*:

   called by defendant (out of order); Cement Division's Milwaukee plant superintendent in 1979

3. *EUGENE P. STAFFORD*:

   called by plaintiffs; employee of Cement Division; fleet captain in 1979

4. *NORMAN MARTINSON*:

   called by plaintiffs; employee of Cement Division; fleet engineer in 1979

5. *JAMES W. GASKELL*:

   called by plaintiffs; employee of Cement Division; vessel superintendent in 1979

6. *PATRICK J. GALLAGHER*:

   called by plaintiffs; former employee of Cement Division; captain of E.M. FORD in 1979

7. *JOSEPH J. ZOLNIEREK*:

   called by plaintiffs; employee of Cement Division; First Assistant Engineer on the E.M. FORD in 1979

8. *ANDREW LaBORDE*:

   called by plaintiffs; customer service manager at MCP Company; amateur photographer

9. *ROBERT M. SORENSON*:

called by plaintiffs as expert witness; Professor of Civil Engineering at Lehigh University; Chief, Coastal Processes and Structures Branch, Corps of Engineers Coastal Research Center; certified to testify regarding coastal engineering, specifically wave action

10. *WRIGHT GARVEY*:

called by plaintiffs; former Deputy Harbor Master of the Port of Milwaukee

11. *ROBERT MacLAREN*:

called by plaintiffs; attorney; Great Lakes captain; tug captain

12. *THOMAS A. PARKS*:

called by plaintiffs; retired ship captain; assistant superintendent in a melathane factory at time of trial

13. *REAR ADMIRAL ROY HOFFMAN, RETIRED*:

called by plaintiffs; Port Director of the Port of Milwaukee in 1979

14. *STANLEY BLAWAS*:

called by plaintiffs; Harbor Operations Supervisor III, Port of Milwaukee (dock superintendent); second in command of port operations in Milwaukee in 1979

15. *JAMES C. SHERMAN*:

called by plaintiffs; employee of Great Lakes Protective Association; marine surveyor

16. *WALTER C. HECKL:*

    called by defendant (out of order); former manager of Advance Boiler & Tank Company

17. *WILLIAM WADE:*

    called by defendant; marine consultant, engineer and surveyor who had worked for Edward E. Gillen Company and Cement Division

18. *LOUIS E. CARTER:*

    called by defendant as expert witnesses; shipmaster on Great Lakes

19. *PAUL WIENING:*

    called by defendant; photographer

20. *DEAN HONADEL:*

    called by defendant; field engineer, Milwaukee Port Authority; third in command of engineering department of Milwaukee Harbor in 1979

21. *BEVERLY J. STRIKE:*

    called by defendant; Port of Milwaukee Administrative Manager; Secretary to Board of Harbor Commissioners

22. *THOMAS E. DOYLE:*

    called by defendant as expert witness; shipmaster on Great Lakes

23. *STANLEY CATAROZOLI:*

    called by defendant; employee of Edward E. Gillen Company; winter carpenter; pile driver

24. *KEITH IVERSON:*

    called by defendant; employee of Edward E. Gillen Company; crane operator

25. *SALVATORE A. GUMINA*:

    called by defendant; employee of Edward E. Gillen Company; foreman; supervisor of pile driving and winter boat repair

26. *FLOYD BROWN*:

    called by defendant; assistant vice president of American Steamship; in charge of engineering; marine superintendent

27. *JOHN HANNINEN*:

    called by defendant; attorney; Chairman and Attorney-in-Fact of Great Lakes Protective Association 1966-80

28. *VICTOR H. ANDERSON*:

    called by plaintiffs; shipmaster; United States Registered Pilot; employee of Lakes Pilots Association, Inc. at time of trial

In addition to these witnesses, the parties designated portions of the depositions of the following witnesses for inclusion in the record:

1. *JAMES SHERIDAN*:

   employee of Cement Division; Third Assistant Engineer on E.M. FORD in 1979

2. *ROBERT MALASKI*:

   employee of Cement Division; oiler on E.M. FORD in 1979

3. *LIEUTENANT RANDALL PARMANTIER*:

   lieutenant commander in United States Coast Guard in 1979; stationed at United States Coast Guard Marine Safety Office in Milwaukee, Wisconsin in 1979; investigated sinking of E.M. FORD

4. *RALPH W. BIGGS, JR.*:

   employee of Litton Great Lakes Corporation; vice president of Erie Marine Division; in charge of winter mooring of the ITS PRESQUE ISLE in Milwaukee

5. *MARK PRESPER*:

   shop foreman for Milwaukee Recharging Service at time of trial; Port Captain for United States Steel until winter of 1979-80

6. *CHARLES O. ARNOLD*:

   retired employee of Litton Great Lakes Corporation, Erie Marine Division; machinery supervisor

7. *JAMES HASKELL*:

   former Deputy Municipal Port Director of the Port of Milwaukee

8. *JOHN T. BURKE*:

   designated as expert witness by plaintiffs; expertise in moorings; retired United States Registered Pilot, District 2

9. *ROBERT FRANCIS BOWES*:

   designated as expert witness by plaintiffs; weatherman; former employee of United States Department of Commerce, National Weather Service; expertise in forecasting

10. *RICHARD JENNE*:

    employee of Cement Division; able seaman; wheelsman; watchman; operated winches on E.M. FORD

11. *THOMAS GOEDEWAAGAN*:

    marine surveyor; former resident surveyor for winter mooring approvals for United States Salvage Association, Inc.

12. *TRUE LeMON*:

    ship surveyor; formerly resident surveyor for Great Lakes area for United States Salvage Association, Inc.

13. *LIEUTENANT E. SCOTT VARNEY*:

    employed by National Oceanic and Atmospheric Administration

Following the conclusion of the liability phase of this trial, the parties filed their final arguments and posttrial briefs. Having reviewed these submissions as well as the testimony, depositions, and exhibits received at trial, the court now sets forth its Findings of Fact separately from its Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

I. FINDINGS OF FACT

Prior to trial the parties submitted a Statement of Uncontested Facts. *See* Supplemental Pretrial Report (filed December 23, 1985). These facts have been adopted by the court, as modified,[5] and incorporated into the court's own findings of facts which were established by a preponderance of the evidence at trial.

A. PARTIES

1. Plaintiff, Cement Division, National Gypsum Company (formerly known as Huron Cement Company)

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[5] Although parties are entitled to require a fact finder to accept stipulations, modifications may be effected by the court if the parties present evidence on these issues at trial. *See Frank Music Corporation v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 n.9 (9th Cir. 1985).

is, and at all times relevant to this matter was, a corporation and the owner and operator of the S.S. E. M. FORD, a vessel of the United States engaged in maritime commerce and navigation on the Great Lakes, their harbors, tributaries and connecting waters. *See* Statement of Uncontested Facts at ¶ 1; Amended Complaint in Admiralty at II.

2. The remaining plaintiffs were, at all times relevant to this matter, insurers and marine underwriters of the S.S. E. M. FORD under policies and contracts of insurance covering loss to the hull and machinery of said vessel or its cargo. These remaining plaintiffs are: Reed & Brown, Inc., New York Marine Managers, Inc., Allstate Insurance Company, Highlands Insurance Company, Employers Casualty Company of Texas, Donald H. Miller, Inc., U.S. Fidelity and Guarantee Company, Great Lakes Protective Association, The Atlantic Companies, Lloyds Underwriters, Institute Companies, including: Commercial Union Assurance Co. Ltd. "I" A/o., Andrew Weir Insurance Co. Ltd., English & American Insurance Co. Ltd. "M" 1 A/o., Orion Insurance Co. Ltd. "T" A/o., Yasuda Fire & Marine Insurance Co. (U.K.) Ltd. "T" A/o., Atlas Assurance Co. Ltd. "T" A/o., Phoenix Assurance Co. Ltd., British Law Insurance Co. Ltd., Road Transport and General Insurance Co. Ltd., Insurance Company of North America (U.K.) Ltd. "G" A/o, Insurance Company of North America (U.K.) Ltd. "O" A/o., Home Insurance Co. Ltd. "X" A/o., London & Hull Maritime Insurance Co. Ltd., Hanover Insurance Co. Ltd., Sphere Insurance Co. Ltd., Drake Insurance Co. Ltd., Bishopsgate Insurance Co. Ltd. "F" A/o., British Law Insurance Co. Ltd. No. 2 A/o., Minster Insurance Co. Ltd. No. 2 A/o., Insurance

Corporation of Ireland "L" A/o., Folksam International Insurance Co. (U.K.) Ltd., Terra Nova Insurance Co. Ltd. per Andrew Drysdale Ltd., Economic Insurance Co. Ltd. "General" A/o.. *See* Statement of Uncontested Facts at ¶ 1; Amended Complaint in Admiralty at II.

3. At all material times the S.S. E. M. FORD was a self-unloading bulk cement carrier having a molded length of 413.67 feet, a molded beam of 50 feet and a reciprocating steam engine of 1500 h.p. for propulsion. *See* Statement of Uncontested Facts at ¶ 4.

4. The defendant, City of Milwaukee, is a municipal corporation organized under the laws of the State of Wisconsin and, at all times relevant to this matter, it owned and operated a number of docks, wharves, piers and vessel berths in the harbor of Milwaukee through a Board of Harbor Commissioners under the Laws of Wisconsin and the Milwaukee City Charter and Code of Ordinances. The City, through its Board of Harbor Commissioners, employed a Port Director and other municipal employees through which it acted as a wharfinger, offering to vessel operators and shipowners a number of docks, wharves, piers and vessel berths for use by vessels in return for payment of money. The wharves and docks furnished for hire by the City included Terminals No. 1, No. 2, No. 3, No. 4 and the piers adjacent to Slips 1, 2 and 3 in the Milwaukee Outer Harbor and the City Heavy Lift Dock and the Municipal Mooring Basin in the Milwaukee Inner Harbor. *See* Statement of Uncontested Facts at ¶ 2; Amended Complaint in Admiralty at III; Amended Answer and Counterclaim in Admiralty at ¶ 3; Third Party Complaint in Admiralty at ¶ 2.

5. The main entrance channel of Milwaukee Harbor has a basin composed of breakwaters which widens from 358 feet at the outer end to 552 feet at the inner end where the sides of the entrance walls connect to the main breakwaters north and south of the channel. *See* Stipulation of Uncontested Facts at ¶ 5.

6. Roy Hoffman was appointed Port Director of the Port of Milwaukee effective October 2, 1978. *See* Stipulation of Uncontested Facts at ¶ 25; Transcript at 1044 (Testimony of Roy Hoffman).

7. James Haskell was employed as Deputy Port Director by the City from June 1970 to July 1978, as Acting Port Director from July 1978 to October 1978, and as Deputy Port Director from October 1978 up to and including December 21-25, 1979. *See* Stipulation of Uncontested Facts at ¶ 24; Exhibit 209 (Deposition of James Haskell at 3-5).

8. The third-party defendant, Edward E. Gillen Company, is a Wisconsin corporation with offices, equipment, employees and facilities located at 218 West Becher Street, Milwaukee, Wisconsin, and at all times relevant to this matter was engaged in the business of construction and pile driving, including construction of pilings, caissons, earth retention, dockwalls and dredging, and in the business of making ship repairs. Under ship supervision, Gillen Company also furnished labor and equipment to moor vessels and handled the anchors and anchor chains of vessels while placing them in winter moorings. Under the supervision of the ship owner, Gillen would also assist in shifting laid up vessels from one location to another and remooring them, and performing related

services for shipowners and the owners and operators of docks and other marine structures at the Port of Milwaukee, Wisconsin. At times Gillen Company performed such work on oral agreements with shipowners and their representatives. Gillen did not employ licensed navigation personnel qualified to navigate the E. M. FORD. *See* Statement of Uncontested Facts at ¶ 3; Third-Party Complaint in Admiralty at ¶ 3; Transcript at 1207-08 (Testimony of Stanley Blawas); Exhibit 206 (Deposition of Ralph Biggs at 12-21, 28-39).

B. JURISDICTIONAL FACTS

9. The damage to the S.S. E. M. FORD occurred on navigable water in the Milwaukee Harbor located on Lake Michigan. *See* Statement of Uncontested Facts at ¶¶ 28 & 45.

10. The City of Milwaukee's dock at Terminal Pier No. 1 in South Slip No. 1 was damaged by the S.S. E. M. FORD, a vessel which was on the navigable water of Lake Michigan when the damage occurred. *See* Statement of Uncontested Facts at ¶¶ 36 & 44.

C. THE FINAL 1979 VOYAGE, LAYUP AND SINKING OF THE S.S. E. M. FORD

Contract for Winter Mooring Berth

11. On November 15, 1979, Captain Eugene P. Stafford, employed as Fleet Captain by Cement Division, telephoned Stanley M. Blawas, employed as Dock Superintendent by the City's Board of Harbor Commissioners, and requested a winter layup berth for the S.S. E. M.

FORD. Stanley Blawas offered Terminal No. 4 at Slip No. 2, located in Milwaukee's outer harbor, as a winter layup berth for the vessel from about December 23, 1979, to March 1, 1980, at a dockage fee of $.70 per lineal foot per month plus metered charges for electricity and water furnished to the vessel. Stafford inquired about securing an inner berth, but Blawas told him that all the inner berths were reserved. Stafford also inquired about the safety of Terminal No. 4 and Blawas assured him it was safe. Stafford then accepted the offer of Terminal No. 4 and confirmed the reservation in a letter of the same date to Stanley M. Blawas. *See* Statement of Uncontested Facts at ¶ 8; Transcript at 1189-96, 1165-68, (Testimony of Stanley Blawas), 916 (Testimony of Wright Garvey), 390 (Testimony of James Gaskell), 231, 227, 196-202 (Testimony of Eugene Stafford); Exhibits 106 & 130.

12. The November 15, 1979, letter from Captain Eugene P. Stafford to Dock Superintendent Stanley Blawas stated:

> As per our conversation on November 15, 1979, we will be berthing the Steamer E. M. FORD for the winter months in Milwaukee at the South Pier #2, Terminal #4.
>
> The winter mooring time will be approximately from 12/23/79 to 3/1/80.

Exhibit 106.

13. Dock Superintendent Stanley Blawas had authority at all relevant times from the Port Director and Assistant Port Director to offer berths to vessels at any of defendant's docks in the Port of Milwaukee, without being required to obtain approval from the Port Director, Deputy Port Director, or any other representative or

employee of the City. *See* Statement of Uncontested Facts at ¶ 20; Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶ 27; Transcript at 1167-68 (Testimony of Stanley Blawas), 1045 (Testimony of Roy Hoffman); Exhibit 209 (Deposition of James Haskell at 7-8).

14. Under the 1977 Public Port Tariff published by the Board of Harbor Commissioners of the City of Milwaukee which was in effect during all times relevant to this lawsuit, the Board reserved the right to make berth assignments and to order vessels off berths. *See* Transcript at 1186 (Testimony of Stanley Blawas), 1126-37, 1073-79 (Testimony of Roy Hoffman), 906-11 (Testimony of Wright Garvey); Exhibits 150 at Items 6, 10, 11 & 25; 207 (Deposition of Mark Presper at 55); 209 (Deposition of James Haskell at 20-21).

15. In 1979, the City of Milwaukee had no regulations in effect governing winter moorings or temporary tie ups of vessels at the Port of Milwaukee. *See* Transcript at 1130-31 (Testimony of Roy Hoffman).

Warning

16. Early in December of 1979, William Wade, a marine surveyor who had done work as an independent contractor for the Edward E. Gillen Company and for Cement Division, called Cement Division and, in the course of his conversation with Vessel Superintendent James Gaskell, warned the company that ships tied up in slips in the outer harbor at Milwaukee were subject to

heavy surge[6] during strong northeasterly winds. *See* Transcript at 1493-94, 1488-89, 1454, 1447-49 & 1434 (Testimony of William Wade).

Departure and Voyage

17. The E.M. FORD departed from Alpena, Michigan for Milwaukee on December 19, 1979, at 1704 hours Eastern Standard Time. At all material times the E.M. FORD had a cargo of bulk cement which had been loaded at Alpena for delivery to Milwaukee. *See* Statement of Uncontested Facts at ¶ 7; Transcript at 437-39 (Testimony of Patrick Gallagher), 82-83 (Testimony of Robert Brissette); Exhibit 101.

18. On this voyage the master of the E.M. FORD was Captain Patrick Gallagher. Captain Gallagher had been master of the FORD since 1975. *See* Transcript at 433 (Testimony of Patrick Gallagher).

Change in Orders

19. On the afternoon of December 21, 1979, before the E.M. FORD reached Milwaukee, Captain Gallagher's winter mooring orders were changed.

> (a) Cement Division's Fleet Captain, Eugene Stafford, called Captain Gallagher and

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[6] Captain Louis Carter explained that a surge occurs "when you get these waves coming in and coming up against a shore or a nonmovable object and it can only move, go that way as far and so long and it has to return. So consequently you get an incoming action and an outgoing action." Transcript at 1548 (Testimony of Louis Carter).

told him that the E.M. FORD would not be mooring for the winter at Terminal No. 4. Instead, the vessel was to proceed to Milwaukee and wait for its sister ship, the S.S. S.T. CRAPO, to unload, then the FORD was to proceed to Cement Division's terminal in Milwaukee's inner harbor where it would be moored for the winter. *See* Transcript at 546, 439-40 (Testimony of Patrick Gallagher); 206-07 (Testimony of Eugene Stafford).

(b) Later that day, during a second call, Stafford told Gallagher that the FORD could wait for the CRAPO at Terminal No. 4 or at the Wisconsin Electric Power Company slip in the inner harbor. *See* Transcript at 546-49, 442-44 (Testimony of Patrick Gallagher), 208-10 (Testimony of Eugene Stafford).

(c) After consulting with his first mate, Gallagher decided not to use the Wisconsin Electric Power Company slip because there was mud in that slip which might get into the ship's boilers. *See* Transcript at 548, 444 (Testimony of Patrick Gallagher). In addition, not traveling to the Power Company slip would save two hours of travel in the river. *See* Transcript at 208 (Testimony of Eugene Stafford).

Agreement to Use Terminal No. 1

20. On December 21, as the E.M. FORD approached Milwaukee, Captain Gallagher made a security call by radiotelephone to dock superintendent Stanley Blawas. *See* Statement of Uncontested Facts at ¶ 8. Gallagher informed Blawas of the change in his orders and told Blawas that the FORD would be waiting for the CRAPO until December 23. Blawas then offered to let the FORD tie up temporarily at Terminal Pier No. 1 in South Slip

No. 1 in the outer harbor. Blawas explained that it would be easier for the FORD to maneuver in and out of that slip. *See* Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶ 4; Transcript at 1169-70 (Testimony of Stanley Blawas), 917 (Testimony of Wright Garvey), 494 & 446-49 (Testimony of Patrick Gallagher). Before accepting the offer of South Slip No. 1, Gallagher asked Blawas about the depth of the water and the availability of power. He did not ask about the safety of the berth. *See* Transcript at 1196 (Testimony of Stanley Blawas), 448-49 (Testimony of Patrick Gallagher).

21. After accepting the berth at Terminal Pier No. 1 in South Slip No. 1, Captain Gallagher consulted the 1979 *United States Coast Pilot*. This publication contains no warning that hazardous surge conditions can develop in slips in the outer harbor at the Port of Milwaukee when there is a strong wind from the northeast. *See* Transcript at 540-42, 532-37, 518-24, 449 (Testimony of Patrick Gallagher), 255, 230-31, 225, 202-06 (Testimony of Eugene Stafford); Exhibits 187 & 584. However, the *Coast Pilot* does state that: "During rough weather the entire breakwater system [at the Port of Milwaukee] may be obscured by wave action." Exhibit 187. *See also* Transcript at 1693-94, 1690 (Testimony of Louis Carter), 255 (Testimony of Eugene Stafford).

Arrival and Tie Up

22. The E. M. FORD arrived at Terminal Pier No. 1 in Slip No. 1, Milwaukee Outer Harbor at 1631 hours on December 21, 1979, and thereafter was tied up starboard side to the dock and with the bow facing in. *See* Statement

of Uncontested Facts at ¶ 9; Transcript at 450-53 (Testimony of Patrick J. Gallagher), 83-85 (Testimony of Robert Brissette); Exhibits 101 & 121.

23. The officers and crew of the E.M. FORD tied up the ship with fiber lines and cables. *See* Statement of Uncontested Facts at ¶ 13.

> (a) Initially, the E.M. FORD was tied up with six lines – a standard mooring for a vessel with a crew on board. *See* Transcript at 549-51 (Testimony of Patrick Gallagher), 84-85 (Testimony of Robert Brissette); Exhibit 554.
>
> (b) Hours after the initial mooring, Captain Gallagher ordered the crew to double the lines at the bow line, at the four abreast lines and at the stern. *See* Transcript at 552-53, 453-54 (Testimony of Patrick Gallagher), 129-31, 85-86 (Testimony of Robert Brissette); Exhibits 121[7] & 657 (Deposition of Richard Jenne at 15).

24. The City's Terminal No. 1 dock in Slip No. 1, Milwaukee Outer Harbor, was constructed in 1932. Cleats made of steel, 30 inches long, spaced approximately 60 feet apart and secured along the outboard edge of said dock with four bolts 1-1/4 inches in diameter and about three feet long, set in concrete, were installed for use by vessels as mooring devices, and such mooring cleats were there for use by the E. M. FORD at all relevant times. *See* Statement of Uncontested Facts at ¶ 22.

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[7] First Mate Robert Brissette explained two inaccuracies in the mooring diagram which is Exhibit 121. Two lines shown on the diagram as doubled were, in fact, single. *See* Transcript at 103-14 (Testimony of Robert Brissette).

25. In 1979, Terminal No. 1, South Slip No. 1 was about 950 feeet long and 250 feet wide. *See* Statement of Uncontested Facts at ¶ 23; Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶ 48.

26. Although Captain Patrick Gallagher, master of the E. M. FORD, had been aboard vessels entering the Port of Milwaukee thirty to forty times during his career, he had never moored a vessel during the winter in the outer harbor at Milwaukee prior to December of 1979, and had never witnessed dangerous surges in the outer harbor. *See* Transcript at 2222-24, 663, 584-87, 542, 525, 434-36 (Testimony of Patrick Gallagher).

Knowledge of Cement Division and of the City

27. Cement Division's Captain Patrick Gallagher knew or should have known of any dangers which could have developed due to wind and wave action in the outer harbor and South Slip No. 1 from experience in similar harbors; from experience in harbors with similar breakwaters; and from his training and experience as a Great Lakes ship master which requires a general knowledge of water levels, breakwalls, wind and wave action and charts. *See* Transcript at 2241-49 (Testimony of Victor Anderson), 1850-58, 1844, 1838, 1830-31 (Testimony of Thomas Doyle), 1686-1700, 1624-56, 1604-21, 1545-66, 1518-19 (Testimony of Louis Carter), 1369-72 (Testimony of James Sherman), 624, 518-43 (Testimony of Patrick Gallagher), 239-40 (Testimony of Eugene Stafford); Exhibits 649, 649A, 649B & 649C. *See also* 42 C.F.R. §§ 10.05-43 & 10.05-47.

28. The Port of Milwaukee's breakwater structures have three openings. One 500-foot breakwater gap opens into the harbor directly northeast (at an angle of 65 to 67-1/2 degrees) of South Slip No. 1. Therefore, it is open and obvious that this slip has very little breakwall protection from wave action coming from the northeast. *See* Transcript at 1686-93, 1678-82, 1550-56 (Testimony of Louis Carter), 1095-96 (Testimony of Roy Hoffman); Exhibits 103, 104, 144, 160, 182, 182A & 209A (Deposition of James Haskell at 24).

29. From 1912 through 1966, with the exception of several World War II years, one of the plaintiffs, Great Lakes Protective Association (GLPA),[8] published the winter mooring[9] regulations of the United States Salvage Association in its annual reports. Cement Division and its predecessor, Huron Cement Company, were members of the GLPA for years including 1966 – the last year the

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[8] The GLPA is a voluntary association of shipowners who subscribe to the Association's program of sharing risks and losses to their vessels. The members are all underwriters, licensed by the State of Ohio as reciprocal insurers operating on a nonprofit basis. *See* Transcript at 2113 (Testimony of John Hanninen).

[9] In a winter mooring or layup the ship's machinery is laid up, the boilers are drained, the seacocks and seachests are filled, shutters are put over the portholes and fire extinguishers are moved to a central location; no crew member remains on board except a shipkeeper and the vessel is anchored and secured to the dock with wires, deadwires and chains. In sum, the vessel is idle and cold. This is also called a "dry" layup. *See* Transcript at 1571-73 (Testimony of Louis Carter), 1255-56 (Testimony of James Sherman), 949-50 (Testimony of Wright Garvey), 224-25 (Testimony of Eugene Stafford).

winter mooring regulations were published by the GLPA. *See* Statement of Uncontested Facts at ¶ 46; Transcript at 2103-2209 (Testimony of John Hanninen), 1386-90, 1379 (Testimony of James Sherman), 232-36 (Testimony of Eugene Stafford); Exhibits 213 & 213A (Deposition of True LeMon), 593, 614 & 647.

> (a) Cement Division had knowledge of the United States Salvage Association's winter mooring regulation which provided that winter mooring would not be approved in the outer harbor at the Port of Milwaukee. *See* Transcript at 2103-2209 (Testimony of John Hanninen), 2070-90, 2051-66 (Testimony of Floyd Brown), 1377-90 (Testimony of James Sherman), 338-42 (Testimony of Norman Martinson); Exhibits 134, 213 & 213A (Deposition of True LeMon), 581, 586, 586A, 592, 593, 594, 603, 604, 605, 608, 614 & 647.
>
> (b) The United States Salvage Association's winter mooring regulations were used for insurance purposes and were not applied and enforced by marine surveyor inspections to temporary tie ups[10] such as that of the E.M. FORD in December of 1979.
>
> *See* Transcript at 1571-73 (Testimony of Louis Carter), 1491 (Testimony of William Wade), 1419, 1412, 1398, 1255-59 (Testimony of James Sherman), 949-50, 915, 893 (Testimony of Wright Garvey), 224-26 (Testimony of Patrick Gallagher).

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[10] During a temporary tie up, layup or mooring the vessel's machinery is not drained, most of the crew is kept on board and the boilers are kept going. This is also called a "wet" layup. *See* Transcript at 1522 (Testimony of Louis Carter), 1398, 1258-59 (Testimony of James Sherman), 949-50, 915 (Testimony of Wright Garvey).

30. The City of Milwaukee had actual knowledge that a hazardous surge action could develop in South Slip No. 1 in the outer harbor of the Port of Milwaukee and that this surging could pose a danger to vessels tied up there and to the dock itself. This knowledge was based on prior claims;[11] records of prior observations of wind and wave levels at the Port of Milwaukee; and past studies, investigations, proposals and reports dealing with the surge problem. *See* Statement of Uncontested Facts at ¶¶ 18 & 19; Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents (Second Set) at ¶¶ 1, 2 & 5; Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶¶ 10, 12, 13, 14, 15, 17, 18 & 20; Transcript at 1340-43 (Testimony of James Sherman), 1221, 1218, 1154-56, 1151 (Testimony of Stanley Blawas), 1100-10, 1055-72, (Testimony of Roy Hoffman), 993 (Testimony of Robert MacLaren), 843-65 (Testimony of Wright Garvey); Exhibits 143, 144,

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[11] The court admitted records of prior damage claims as evidence of notice to the city of Milwaukee of the possibility of surge developing within Terminal Pier No. 1 in South Slip No. 1. *See* Transcript at 1055-75 (Testimony of Roy Hoffman); Exhibits 156, 159 & 164; Requests for Admissions of Facts and Genuineness of Documents and Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶¶ 10, 12, 13, 14 & 15. However, the records of these claims have little probative value. There was no demonstration that the conditions of the prior accidents were substantially similar to the conditions of the disaster at issue. *See McAllister Brothers, Inc. v. United States,* No. 85-CIV-0098 (CHT) (S.D.N.Y. March 20, 1989); *Tug Ocean Prince, Inc. v. United States,* 436 F. Supp. 907, 921 (S.D.N.Y. 1977), *aff'd in part, rev'd in part on other grounds,* 584 F.2d 1151 (2d Cir. 1978).

147, 156, 159, 164, 174, 209 (Deposition of James Haskell at 12, 17-19), 652.

Second Change in Orders

31. On December 22, 1979, Cement Division's Fleet Engineer, Norman Martinson, informed Captain Gallagher that the E.M. FORD's orders had been changed. The vessel was to lay up temporarily in Milwaukee to permit officers and crew members to be discharged during the Christmas holiday from December 22 until December 26 or 27. After the holiday the FORD was scheduled to make one more delivery trip before being moored for the winter. When issuing this change in orders Martinson was not aware that the E.M. FORD was not tied up at Terminal No. 4 – the berth for which Cement Division had contracted. *See* Transcript at 566-68, 455-56 (Testimony of Patrick Gallagher), 375-77, 315 & 295-300 (Testimony of Norman Martinson).

32. Captain Gallagher protested the change in orders to Norman Martinson. He pointed out that he and the crew had had a long and arduous season. Gallagher was anxious to go home for the holiday and did not want to return to the E.M. FORD for another trip. *See* Transcript at 568-69, 456-57 (Testimony of Patrick Gallagher), 298 (Testimony of Norman Martinson).

33. After Captain Gallagher received this change in orders, he told the crew to put out the winter mooring lines. With the additional lines, the number of lines then totalled twenty-two. *See* 455-60 (Testimony of Patrick Gallagher); Transcript at 160, 132, 91-92 (Testimony of Robert Brissette); Exhibit 121. Putting out these additional lines

exhausted the supply of lines stored on the E.M. FORD. *See* Exhibit 657 (Deposition of Richard Jenne at 24).

December 22 Meeting

34. On the morning of December 22, 1979, Salvatore Gumina, a foreman for the Edward E. Gillen Company, and Dock Superintendent Stanley Blawas, who happened to be aboard the E.M. FORD on other business, met with Captain Gallagher.

> (a) Captain Gallagher told Blawas and Gumina that his orders had changed and that the FORD would lay up temporarily in Milwaukee and that part of the crew would go home for the holiday and would not return until December 26 or 27.
>
> (b) Blawas said that the FORD could remain at Terminal No. 1,[12] but warned that the outer harbor could get "heavy" if a storm came up. At the same time Blawas told Captain Gallagher that the waves in Terminal No. 1 were generally 1-2 feet.

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[12] The dock at Terminal No. 1, Slip No. 1, was used as a berth for the E.M. FORD at the wharfage rate set forth in the City of Milwaukee Public Tariff effective April 25, 1977, as amended. *See* Statement of Uncontested Facts at ¶ 12. The City billed Cement Division for dockage at Terminal No. 1, South Slip No. 1, for the E. M. FORD from 1530 hours Central Standard Time on December 21, 1979, to 1400 hours Central Standard Time on December 24, 1979, in the amount of $156.54, which was fully paid by Cement Division to the City. *See* Statement of Uncontested Facts at ¶ 21.

The winter mooring rate is cheaper than the City's regular mooring rate. *See* Transcript at 1191-93, 1150 (Testimony of Stanley Blawas).

> (c) Blawas suggested that Captain Gallagher tie up the FORD at the City of Milwaukee's heavy lift dock in the inner harbor because it had electric power. Captain Gallagher rejected this proposal because the FORD crew had already started to put out the extra lines.
>
> (d) Captain Gallagher and Gumina agreed that Gumina would check the FORD's moorings and provide lines and fenders as needed. Although Captain Gallagher had had no prior dealings with Gumina or with the Gillen Company, he did not ask Gumina what services, equipment or personnel the Gillen Company could provide in an emergency.
>
> (e) Before Blawas and Gumina disembarked, they gave Captain Gallagher their telephone numbers.

See Statement of Uncontested Facts at ¶¶ 11 & 14; Transcript at 2223-30 (Testimony of Patrick Gallagher), 2005-10, 1974-76 (Testimony of Salvatore Gumina), 1294-96 (Testimony of Walter Heckl), 1234-35, 1227-29, 1235-37, 1214, 1196-1209 (Testimony of Stanley Blawas), 699-701, 681-82 (Testimony of Joseph Zolnierek), 580-84, 493-94, 461-72 (Testimony of Patrick Gallagher), 174, 154-55, 135, 92-101 (Testimony of Robert Brissette); Exhibits 132 & 657 (Deposition of Richard Jenne at 18-20).

Discharge of Crew and Departure of Captain

35. On the afternoon of December 22, 1979, Captain Gallagher signed United States Coast Guard certificates discharging the entire crew.

> (a) All but five crew members then left the ship.

(b) Five crew members (none of them from the deck crew) volunteered or were designated[13] to remain on board. They were:

James Sheridan, third assistant engineer
Robert Malaski, oiler
James Simpson, night porter and acting steward
Hussain Bubakr, wiper
Mohamed Ghazaly, porter

(c) James Sheridan was left in charge as the de facto shipkeeper.[14] These five were to make sure that one boiler was running and to keep the plant and generator running. No one was assigned to watch the the weather. Sheridan was told that the Edward E. Gillen Company would help with the lines and provide any manpower needed.

(d) Before leaving the ship, Captain Gallagher sent the telephone number of Salvatore Gumina to First Assistant Engineer Joseph Zolnierek who gave it to James Sheridan. Telephone numbers of Cement Division personnel were also available aboard ship.

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[13] Captain Gallagher testified that fleet engineer Norman Martinson selected the crew members who would remain aboard, while Martinson testified that it was Gallagher. A resolution of this conflict is immaterial to this action; however, it is interesting to note that in Martinson's opinion, "It wouldn't have mattered too much [which crew members were left aboard] because we had some pretty good competent people in there." Transcript at 334 (Testimony of Norman Martinson) This assessment proved to be overly optimistic.

[14] Cement Division had no policy or procedure setting forth the duties expected of a shipkeeper during a temporary layup. *See* Transcript at 256 (Testimony of Eugene Stafford).

See Statement of Uncontested Facts at ¶¶ 16 & 17; Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶ 8; Transcript at 678-83 (Testimony of Joseph Zolnierek), 637, 611-22, 517, 472-80, 459 (Testimony of Patrick Gallagher), 154, 101 (Testimony of Robert Brissette); Exhibits 132, 202 & 202A (Deposition of James Sheridan at 46-47, 50-54, 56, 60, 63, 109), 203 & 203A (Deposition of Robert Malaski at 25-26, 62-63, 66), 509 & 513.

36. It was the practice of Cement Division to sign the entire crew off the ship's articles and off the payroll at any time the ship was temporarily or permanently laid up. Implementation of this practice saved money for Cement Division. The union contract with the ship's unlicensed personnel required a winter sailing bonus for days worked after December 20. The company was also obligated to pay a premium for work over a holiday weekend. *See* Transcript at 1256-59 (Testimony of James Sherman), 517, 459 (Testimony of Patrick Gallagher), 154 (Testimony of Robert Brissette); Exhibits 527 & 528.

37. Before leaving the E.M. FORD, Captain Gallagher shut down all the radios and radiotelephone. The radiotelephone was locked in the radiotelephone cabinet which was locked in the pilot house. James Sheridan had keys for the entire ship, but he did not have a license to operate the radiotelephone and did not know how to operate the equipment.[15] There was no other

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[15] Robert Malaski, the oiler left aboard the E.M. FORD, had been a radioman first class in the United States Coast Guard. *See* Exhibit 203 (Deposition of Robert J. Malaski at 5-6). Malaski made no attempt to operate the E.M. FORD's equipment on December 24, 1979.

ship-to-shore telephone aboard the E.M. FORD during December 22-25, 1979. Captain Gallagher expected the crew to use a pay telephone on shore in case of emergency. *See* Statement of Uncontested Facts at ¶ 15; Transcript at 670, 617-18 (Testimony of Patrick Gallagher).

38. When its ships were temporarily laid up, Cement Division's practice was not to require them to maintain any type of radio contact. *See* Transcript at 654-55 (Testimony of Patrick Gallagher), 248 (Testimony of Eugene Stafford). *See also* Transcript at 1661 (Testimony of Louis Carter).

Weather

39. The E.M. FORD was a ship which reported actual weather and water conditions to the United States Coast Guard. However, its practice was not to monitor or report weather conditions while in port. *See* Transcript at 634, 630-31, 552-65 (Testimony of Patrick Gallagher), 247-48 (Testimony of Eugene Stafford), 145-49 (Testimony of Robert Brissette); Exhibits 643, 641 & 526. *See also* Transcript at 1661 (Testimony of Louis Carter).

40. The National Weather Service at Chicago, Illinois broadcasts periodic weather forecasts for the area which includes the Port of Milwaukee. From the evening of December 21, 1979, when the E.M. FORD tied up at the Port of Milwaukee, through December 24, 1979, when attempts to rescue the FORD ceased, these forecasts included:

(a) *9:39 p.m., Central Standard Time, Friday, December 21, 1979:* south-to-southeast winds 15 to 25 knots the remainder of the night, diminishing to 10 to 20 knots Saturday, with waves 2 to 5 feet, decreasing Saturday. This forecast was broadcast to mariners as a marine forecast (MAFOR)[16] at midnight, Central Standard Time, on that date.

(b) *9:34 a.m., Central Standard Time, Saturday, December 22, 1979:* southerly winds 12 to 22 knots in the afternoon, becoming southeasterly 15 to 25 knots later that night and continuing Sunday, with waves 1 to 3 feet. This MAFOR was broadcast at noon, Central Standard Time, on that date.

(c) *3:39 p.m., Central Standard Time, Saturday, December 22, 1979:* southeast-to-south winds 10 to 20 knots that night, increasing to 15 to 25 knots Sunday, with waves 1 to 3 feet. This MAFOR was broadcast at 6:00 p.m., Central Standard Time, on that date.

(d) *9:39 p.m., Central Standard Time, Saturday, December 22, 1979:* southeast-to-south winds 10 to 18 knots the remainder of the night, becoming southwesterly 10 to 20 knots. This MAFOR was broadcast at midnight, Central Standard Time, on that date.

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[16] MAFORs are weather forecasts and synopses broadcast by the National Weather Service four times a day. MAFORs give the predicted weather for each of the Great Lakes for a twenty-four hour period. They also give the position of pressure areas and their predicted movements.

Great Lakes mariners also receive LAWEBs twice a day. These reports give the actual weather at shore installations like Milwaukee. They also give wind direction, the height of the water and barometer readings. *See* Transcript at 1700-01, 1565-58, 1520-21 (Testimony of Louis Carter), 630-39 (Testimony of Patrick Gallagher).

(e) *3:39 a.m., Central Standard Time, Sunday, December 23, 1979*: south-to-southeast winds 12 to 22 knots that day, becoming northeasterly that night, with waves 1 to 3 feet. This MAFOR was broadcast at 6:00 a.m., Central Standard Time, on that date.

(f) *9:34 a.m., Central Standard Time, Sunday, December 23, 1979*: southeast winds 12 to 22 knots that afternoon and early that night, becoming northeasterly 12 to 22 knots later that night and northerly winds 18 to 28 knots Monday, with waves 1 to 3 feet. This MAFOR was broadcast at noon, Central Standard Time, on that date.

(g) *3:39 p.m., Central Standard Time, Sunday, December 23, 1979*: southerly winds 10 to 17 knots early that night, becoming east-to-northeasterly 12 to 22 knots later that night and northeast-to-north winds increasing to 20 to 30 knots Monday, with waves 1 to 3 feet increasing to 4 to 7 feet by morning. This MAFOR was broadcast at 6:00. p.m., Central Standard Time, on that date.

(h) *9:39 p.m., Central Standard Time, Sunday, December 23, 1979*: southerly winds 10 to 17 knots early that night, becoming east-to-northeasterly 12 to 22 knots later that night and northeast-to-north winds increasing to 20 to 30 knots Monday, with waves 1 to 3 feet increasing to 4 to 7 feet by morning. This MAFOR was broadcast at 6:00 p.m., Central Standard Time, on that date.

(i) 3:39 a.m., Central Standard Time, Monday, December 24, 1979: east-to-northeast winds 15 to 25 knots, becoming northeasterly 25 to 35 knots that afternoon and northeast-to-north 30 to 40 knots that night, with waves 2 to 4 feet, increasing to 6 to 12 feet that night. This

MAFOR was broadcast at 6:00 a.m., Central Standard Time, on that date.[17]

(j) *9:34 a.m., Central Standard Time, Monday, December 24, 1979*: northeast-to north winds 30 to 40 knots that afternoon and early that night and northerly 25 to 35 knots later that night and north-to-northwesterly 15 to 25 knots Tuesday, with waves 6 to 12 feet. This MAFOR was broadcast at noon Central Standard Time, on that date.

(k) *3:39 p.m., Central Standard Time, Monday, December 24, 1979*: northeast-to-north winds 40 to 55 knots early that night and northerly 35 to 45 knots later that night and north-to-northwesterly 20 to 30 knots and gradually diminishing during Tuesday, with waves 6 to 12 feet. This MAFOR was broadcast at 6:00 p.m., Central Standard Time, on that date.

(l) *9:39 p.m., Central Standard Time, Monday, December 24, 1979*: northeast-to-north winds 35 to 45 knots with gusts to 50 knots the remainder of that night, becoming north-to-northwest 28 to 40 knots Tuesday morning, diminishing to 22 to 32 knots Tuesday afternoon, with waves 6 to 12 feet. This MAFOR was broadcast at midnight, Central Standard Time, on that date.

See Answers to Plaintiff's Requests for Admissions of Facts and Genuineness of Documents at ¶¶ 31-42; Transcript at 1659-60, 1520-46 (Testimony of Louis Carter), 654-59, 592-602 (Testimony of Patrick Gallagher); Exhibits 211 (Deposition of Robert Francis Bowes at 26-33), 515.

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[17] At 7:00 A.M., on December 24, 1979, the United States Coast Guard posted gale warnings for southern Lake Michigan.

41. On December 24, 1979, the actual wind velocities recorded for Milwaukee were:

6:00 A.M.	20 knots-per-hour
8:00 A.M.	22 knots-per-hour
10:00 A.M.	24 knots-per-hour
12:00 P.M.	35 knots-per-hour
2:00 P.M.	30 knots-per-hour
4:00 P.M.	40 knots-per-hour
6:00 P.M.	35 knots-per-hour
8:00 P.M.	30 knots-per-hour
12:00 A.M.	24 knots-per-hour

See Exhibits 138, 211 (Deposition of Robert Francis Bowes at 33-40), 516.

42. The significant wave heights[18] measured by the United States Coast Guard at the entrance to Milwaukee's harbor at periodic intervals on December 24, 1979, were:

6:00 A.M.	3.4 feet
12:00 P.M.	7.4 feet
6:00 P.M.	13.6 feet

43. Had he been aboard the E. M. FORD, Captain Gallagher, using his training and experience as a ship's master, could have monitored and evaluated the weather data which was available on December 23 and 24 to anticipate that gale-force winds from the northeast were developing on southern Lake Michigan which could pose

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[18] A wave's height is the vertical distance between its trough and its crest as measured by reference to the mean water level. The "significant wave height" is the average of the highest one third of the waves. *See* Transcript at 816-17 (Testimony of Robert Sorenson).

as a danger to the ship. *See* Transcript at 1832-33 (Testimony of Thomas Doyle), 1541, 1545-46 (Testimony of Louis Carter); Exhibits 641, 642 & 643.

44. Although the City of Milwaukee Board of Harbor Commissioners maintains a courtesy weather watch during regular business hours, it does not offer weather watch services to users of its facilities. The City's custom and practice is to notify users of its harbor facilities if winds arise in excess of 30-knots-per-hour. Regular business hours do not include weekends and holidays. At those times no one is on duty at the Port of Milwaukee except a security watchman. *See* Transcript at 1195-96, 1158-59 (Testimony of Stanley Blawas), 1133, 1128 (Testimony of Roy Hoffman), 941 (Testimony of Wright Garvey).

45. Cement Division did not plan to rely on the City's courtesy weather watch when it agreed to tie up the E.M. FORD at Terminal Pier No. 1 in South Slip No. 1.

46. Cement Division's ship, the S.T. CRAPO arrived, unloaded and departed from Cement Division's dock on December 23, 1979. The CRAPO's log shows that it experienced 32-38 knots-per-hour winds on the eastern side of Lake Michigan at noon on December 24. Even though it is a standard custom or practice for ships in a shipowner's fleet to communicate with each other regarding weather, *see* Transcript at 1594 (Testimony of Louis Carter), the CRAPO made no attempt to warn the E.M. FORD of these conditions. *See* Transcript at 1594-97 (Testimony of Louis Carter); Exhibit 644.

Breakaway and Sinking of the E.M. FORD

47. The E. M. FORD remained tied up to the dock at Terminal Pier No. 1 in South Slip No. 1, Milwaukee Outer Harbor, until about noon Central Standard Time on December 24, 1979. *See* Statement of Uncontested Facts at ¶ 29.

See Transcript at 815-19 (Testimony of Robert Sorenson); Exhibit 138.

48. At approximately 1:00 P.M. on December 24, 1979, Third Assistant Engineer James Sheridan, who was aboard the E.M. FORD, noticed that the ship was 10-15 feet off the dock at the stern and that the wind velocity and wave height had increased markedly. Sheridan and another crew member brought the boarding ladder aboard and Sheridan assigned one of the crew to go on deck and call for help. *See* Exhibit 202 (Deposition of James Sheridan at 120-32, 162-68).

49. At approximately the same time Salvatore Gumina, a foreman with the Edward E. Gillen Company, decided to drive around Jones Island in the outer harbor where he had been renovating Gillen offices. Gumina had not seen the FORD since his meeting with Captain Gallagher on December 22. When Gumina stopped his vehicle on the dock, he heard a crewman aboard the E.M. FORD calling for help and saw that the FORD had moved away from the dock. *See* Statement of Uncontested Facts at ¶ 30; Transcript at 2040-43, 2027-37, 2011-12, 1976-79 (Testimony of Salvatore Gumina), 1875-76 (Testimony of Stanley Catarozoli).

50. Gumina then drove to the United States Coast Guard station where the duty officer and junior officer of the day informed him that there was nothing the Coast Guard could do because it was a holiday and no one was available to render assistance. *See* Statement of Uncontested Facts at ¶ 31; Transcript at 1988-89, 1978 (Testimony of Salvatore Gumina).

51. Gumina returned to the Gillen office where he obtained manilla lines and attempted to contact other Gillen employees. He was able to reach five men who agreed to return to work to assist the E.M. FORD. Gumina also informed Don Jackson, an officer of the Gillen Company, and Stanley Blawas of the FORD's plight. After spending at least two hours at the Gillen office, Gumina and the other employees returned to the dock at approximately 3:30 P.M. and attempted to throw lines aboard the E.M. FORD. *See* Statement of Uncontested Facts at ¶¶ 32, 33 & 35; Transcript at 2040-45, 2030-37, 1976-2002 (Testimony of Salvatore Gumina), 783 (Testimony of Andrew LaBorde).

52. Stanley Blawas drove to the dock where someone on board the E.M. FORD called out the telephone number of first assistant engineer Joseph Zolnierek who was at home in Alpena, Michigan. Blawas called Zolnierek for authority to call for the services of tug boats. Zolnierek, in turn, called Captain Gallagher, who was also in Alpena. Later Blawas called Captain Gallagher to tell him that a licensed pilot was needed and suggested some names, including that of Captain Thomas

Parks, a resident of Milwaukee. *See* Statement of Uncontested Facts at ¶¶ 38 & 39; Transcript at 1209-13 (Testimony of Stanley Blawas), 684-85 (Testimony of Joseph Zolnierek), 481-88 (Testimony of Patrick Gallagher).

54. Captain Gallagher contacted the Great Lakes Towing Company to ask for assistance.

> (a) At approximately 4:00 P.M. on December 24, after receiving Cement Division's call for help, the Great Lakes Towing Company dispatched its harbor tug WASHINGTON to assist the E.M. FORD. But, because there was no pilot aboard, Captain Robert MacLaren could not render assistance, so he returned to the dock with the WASHINGTON.
>
> (b) At approximately 6:00 P.M. on December 24, Great Lakes Towing Company dispatched its harbor tugs TEXAS and WASHINGTON to the E.M. FORD for a second time. The tugs could not communicate with the ship, so they returned to their dock.

See Statement of Uncontested Facts at ¶ 43; Transcript at 963-93 (Testimony of Robert MacLaren); 481-88 (Testimony of Patrick Gallagher); Exhibits 202 (Deposition of James Sheridan at 179), 127 & 128.

55. Captain Gallagher also contacted Captain Parks who agreed to join in the efforts to rescue the E.M. FORD. Captain Parks arrived at the dock at approximately 5:30 P.M. on December 24. He observed that the bow of the ship had broken loose from the dock on the north side of the slip and had swung to the south side of the slip against the wallhead where it was pounding against the dock. He noted that there was damage to the FORD's port side, including a hole, and that there was a hole in the

stern. He estimated the waves to be 12-15 feet and the wind velocity to be 30 knots-per-hour. Captain Parks and Captain Gallagher remained in contact throughout the evening by means of a shore telephone. *See* Statement of Uncontested Facts at ¶¶ 35 & 41; Transcript at 1006-19 (Testimony of Thomas Parks), 481-88 (Testimony of Patrick Gallagher).

56. Captain Parks and three Gillen employees jumped aboard the E.M. FORD and attempted to prepare the vessel to be towed from the slip. *See* Statement of Uncontested Facts at ¶¶ 35 & 42; Transcript at 2035 (Testimony of Salvatore Gumina), 1006-19 (Testimony of Thomas Parks), 806-10 (Testimony of Andrew LaBorde).

57. At approximately 8:00 P.M. on December 24, after being summoned by Captain Parks who had activated the radiotelephone aboard the FORD, the harbor tugs TEXAS and WASHINGTON were again dispatched to the E.M. FORD. The tugs remained in the area until 9:30 P.M. when they were released by Captain Parks who had decided that the tugs should not attempt to tie on to the ship because the rolling action of the FORD might endanger the lives of those aboard both vessels. *See* Statement of Uncontested Facts at ¶ 43; Transcript at 1012-17 (Testimony of Thomas Parks), 963-93 (Testimony of Robert MacLaren); Exhibits 202 (Deposition of James Sheridan at 179), 127 & 128.

58. While Captain Parks and Gillen employees manned the power winches and attempted to remoor the E.M. FORD, members of the FORD crew brought up the steam on the boilers, put power on the winches, operated the engine and pumps and took soundings. The cook

proceeded with the preparation of the crew's turkey dinner. *See* Statement of Uncontested Facts at ¶¶ 35, 37 & 42; Transcript at 2035, 1995-2001 (Testimony of Salvatore Gumina), 1902-20 (Testimony of Keith Iverson), 1021-36, 1008-18 (Testimony of Thomas Parks); Exhibits 202 (Deposition of James Sheridan at 133, 138-43, 148-50, 169-87), 203 & 203A (Deposition of Robert Malaski at 6-7, 9, 34-44, 62, 63, 66).

59. Although Captain Parks was able to move the E.M. FORD about 100 feet back into the slip, he and the Gillen men were not able to remoor the ship for any length of time. Lines continued to part. At approximately 11:00 P.M. on December 24, Captain Parks found that the ship was taking on water and was failing to return from her starboard rolls. Near midnight Captain Parks ordered the crew to shut down the boilers and generator. The Captain then ordered everyone off the ship. *See* Statement of Uncontested Facts at ¶¶ 37 & 44; 1999-2003 (Testimony of Salvatore Gumina), Transcript at 1028-30, 1016-20 (Testimony of Thomas Parks); Exhibits 202 (Deposition of James Sheridan at 184-87), 203 (Deposition of Robert Malaski at 44-45).

60. After the persons on board went ashore, the E. M. FORD settled to the bottom of the slip on December 25, 1979. *See* Statement of Uncontested Facts at ¶ 45; Transcript at 1180 (Testimony of Stanley Blawas), 1019-20 (Testimony of Thomas Parks), 936 (Testimony of Wright Garvey), 786-87 (Testimony of Andrew LaBorde), 686-87 (Testimony of Joseph Zolnierek), 490 (Testimony of Patrick Gallagher), 311-12 (Testimony of Norman Martinson); Exhibits 165 & 180.

61. The City of Milwaukee's pier and surrounding property at Terminal Pier No. 1 in South Slip No. 1 was injured by the E.M. FORD's repeated pounding against the dock and its headwall on December 24, 1979. *See* Statement of Uncontested Facts at ¶ 36; Transcript at 1793-1804, 1785-86, 1733-77 (Testimony of Dean Honadel); Exhibit 552.

62. The City of Milwaukee's dock structure at Terminal Pier No. 1 in Slip No. 1 and its cleats and bollards did not fail and was not a cause of the damage to the E.M. FORD or the property of the City of Milwaukee on December 24, 1979. *See* Transcript at 1793-1804, 1785-86, 1733-77 (Testimony of Dean Honadel); Exhibit 552.

63. Once the violent surging began to develop in South Slip No. 1, there were no measures which could have been taken, short of immediately removing the E.M. FORD from the slip, which would have prevented or substantially lessened the injuries which were sustained by the E.M. FORD and the City's dock on December 24 and 25, 1979. The FORD could not be removed because Cement Division failed to retain a master and adequate crew. *See* Transcript at 1574-90 (Testimony of Louis Carter), 659-60 (Testimony of Patrick Gallagher), 164-65, 151 (Testimony of Robert Brissette); Exhibit 213 (Deposition of True LeMon at 97).

64. The complete reliance which Cement Division purported to place on the City of Milwaukee and the Edward E. Gillen Company to warn, rescue and protect the safety of the E.M. FORD was unreasonable under the following circumstances:

(a) When entering into the agreements at issue with the City of Milwaukee and the Edward E. Gillen Company, Cement Division failed to divulge that the S.S. E.M. FORD would be laid up for a period of days without a pilot, without a crew, without ship-to-shore communications and without a weather watch.

(b) Without any prior course of dealing, Cement Division, in the person of Captain Patrick Gallagher, failed to apprise the Edward E. Gillen Company of the services it would need and, at the same time, failed to ascertain whether Gillen had the equipment and manpower needed to render these services.

(c) Crew members remained aboard the S.S. E.M. FORD at all times and should have been in the best position to observe any weather conditions which might affect the vessel and to notify Cement Division personnel in case of an emergency. *See* Transcript at 1850, 1834-35 (Testimony of Thomas Doyle), 1695-98, 1581-87 (Testimony of Louis Carter), 1408-09, 1401-02, 1348-49 (Testimony of James Sherman), 1127-28 (Testimony of Roy Hoffman), 1037-41 (Testimony of Thomas Parks), 588-91 (Testimony of Patrick Gallagher); Exhibits 207 (Deposition of Mark Presper at 57-59), 209 (Deposition of James Haskell at 14 & 17), 210 (Deposition of John Burke at 109).

D. LIABILITY

1. Negligence

65. The City of Milwaukee, acting through its employees and agents, breached its duty of due care for the safety of its own dock and other property and for the safety of the plaintiff's vessel, the S.S. E. M. FORD, by

allowing the E. M. FORD to remain tied up at Terminal Pier No. 1 in South Slip No. 1 for a period of days without adequately warning Cement Division that wind and wave conditions could develop which would endanger the vessel and the City's property with which it would come into contact. Despite its superior knowledge of this hazard, the City failed to exercise its power to order the vessel to remain manned or move off berth.

66. The defendant's breach of its duty of due care, as described in Finding of Fact No. 65, above, was a cause-in-fact of the injury to the S.S. E.M. FORD and of the injury to its own property which occurred on December 24 and 25, 1979.

67. Cement Division, acting through its employees and agents, breached its duty of due care for the safety of its own vessel, the S.S. E.M. FORD, and for the safety of the property of the City of Milwaukee by choosing to tie up the S.S. E.M. FORD for a period of days at Terminal Pier No. 1 in South Slip No. 1 in the outer harbor at the Port of Milwaukee during the month of December despite warnings and knowledge that wind and wave conditions could develop which would endanger the vessel and any property with which it would come into contact. The plaintiff further breached its duty of due care by its captain's failure to take reasonable precautions to ensure the safety of the vessel before departing for a vacation. Captain Gallagher failed to employ a standby master or pilot and crew members who would be capable of removing the vessel or taking any other measures necessary should an emergency arise, failed to employ a crew member to remain aboard who would be capable of operating

ship-to-shore communications facilities, and failed to assign a crew member to monitor the weather.

68. The plaintiff's breach of its duty of due care, as described in Finding of Fact No. 67, above, was a cause-in-fact of the injury to the S.S. E. M. FORD and of the injury to the dock and other property of the City of Milwaukee which occurred on December 24 and 25, 1979.

69. The plaintiffs and the defendant failed to show by a preponderance of the evidence that the acts or omissions of defendant Edward E. Gillen Company were a cause-in-fact of the injury to the S.S. E.M. FORD.

70. Assuming the total fault which caused the injury to the E. M. FORD to be one hundred percent (100%), the court attributes ninety-six percent (96%) of the total fault to the plaintiff Cement Division and four percent (4%) of the total fault to the defendant City of Milwaukee.

71. Assuming the total fault which caused the injury to the City of Milwaukee's dock and other property at Terminal No. 1, South Slip No. 1 to be one hundred percent (100%), the court attributes ninety-six percent (96%) of the total fault to the plaintiff Cement Division and four percent (4%) of the total fault to the defendant City of Milwaukee.

2. Warranty

72. By the acts described in Finding of Fact No. 65, above, the defendant City of Milwaukee breached a wharfinger's implied warranty to provide a safe berth for plaintiff Cement Division's vessel the S.S. E.M. FORD.

73. The plaintiff Cement Division, National Gypsum Company, did not establish by a preponderance of the evidence that the defendant City of Milwaukee expressly warranted Terminal Pier No. 1 in South Slip No. 1 to be a safe berth for a vessel temporarily laid up with no deck crew aboard capable of moving the ship in an emergency.

74. The defendant City of Milwaukee did not breach any express warranties to provide a safe berth at Terminal No. 1, South Slip No. 1 in the Milwaukee Harbor for the plaintiff Cement Division's vessel, the S.S. E.M. FORD.

II. CONCLUSIONS OF LAW

A. JURISDICTION AND JOINDER

1. The district courts have original jurisdiction, exclusive of the courts of the States, of any civil case of admiralty or maritime jurisdiction, saving to suitors, in all cases all other remedies to which they are otherwise entitled. *See* 28 U.S.C. § 1333(1).

2. When torts have occurred on navigable waters within the United States and the alleged wrongs bear a significant relationship to traditional maritime activity, the claims fall within a federal court's admiralty jurisdiction. *See East River Steamship Corporation v. Transamerica DeLeval, Inc.*, 476 U.S. 858, 863-64 (1986); *Complaint of SISSON*, 867 F.2d 341, 343 (7th Cir. 1989).

3. The admiralty and maritime jurisdiction of the United States extends to and includes all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or

injury be done or consummated on land, including ship-caused injuries to a pier. *See* 46 U.S.C. § 740. *See also Nacierma Operating Company, Inc. v. Johnson*, 396 U.S. 212, 222 (1969); *Gutierrez v. Waterman Steamship Corporation*, 373 U.S. 206, 209-10 (1963); *S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 165 (5th Cir. 1979), *cert. denied sub nom. St. Paul Mercury Insurance Company v. East West Towing, Inc.*, 446 U.S. 918 (1980).

4. Third-party defendant Edward E. Gillen Company, Inc. has properly been made a party pursuant to Federal Rule of Civil Procedure 14(c), which provides that:

> When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Federal Rule of Civil Procedure 14(c). *See also Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042, 1045 (5th Cir. 1985); *Riverway Company v. Trumbull River Services, Inc.*, 674 F.2d 1146, 1154-55 (7th Cir. 1982); *United*

States v. Isco, Inc., 463 F. Supp. 1293, 1294-95 (E.D. Wis. 1979); *Ohio River Company v. Continental Grain Company*, 352 F. Supp. 505, 511-13 (N.D. Ill. 1972).

5. This court has admiralty subject matter jurisdiction over the claims made by the plaintiff in the Amended Complaint and by the defendant in its Counterclaim and in its Third-Party Complaint.

B. CAPACITY OF THE CITY OF MILWAUKEE TO SUE AND BE SUED

6. Where a municipality is engaged in a proprietary function, as distinguished from a governmental function, it is answerable for its negligent acts, or those of its agents, just as would an individual or a private corporation. *See Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502, 509 (7th Cir. 1971); *Leemon v. South Jersey Port Commission*, 145 F. Supp. 828, 831 (D.N.J. 1956).

7. Operations of a pier by a port district established under state law for the loading and unloading of commodities is a "proprietary function" and makes a public corporation responsible for any negligence committed by its employees in the course of corporate work. *See Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502, 509 (7th Cir. 1971); *Leemon v. South Jersey Port Commission*, 145 F. Supp. 828, 831 (D.N.J. 1956).

8. The City of Milwaukee, in operating harbor and dock facilities, functions as a general wharfinger. In operating its municipal port, the City of Milwaukee engages in a proprietary function. In the exercise of these functions the City is regarded as having the capacities of a

private corporation which can sue and be sued. *See Bagrowski v. American Export Isbrandtsen Lines, Inc.*, 440 F.2d 502, 509 (7th Cir. 1971); *Paper Makers Importing Company v. City of Milwaukee*, 165 F. Supp. 491, 503 (E.D. Wis. 1958).

C. APPLICABLE LAW

9. In federal maritime actions, federal courts sit as "pure" federal courts, governed by federal procedural rules and federal substantive law. *See Daughtry v. Diamond M Company*, 693 F. Supp. 856, 861 (C.D. Cal. 1988).

10. When admiralty jurisdiction is invoked, substantive admiralty law must be applied. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies. Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules. *See East River Steamship Corporation v. Transamerica DeLaval, Inc.*, 476 U.S. 858, 864-65 (1986); *Kermarac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

11. If admiralty law fails to provide a standard, marine collision liability turns on traditional tort law principles. *See East River Steamship Corporation v. Transamerica DeLaval, Inc.*, 476 U.S. 858, 864-65 (1986); *Floyd v. Lykes Bros. Steamship Company, Inc.*, 844 F.2d 1044, 1046-47 (3d Cir. 1988); *Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir. 1980); *S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 165 (5th Cir. 1979), *cert. denied sub nom. St. Paul Mercury Insurance Company v. East West Towing,*

Inc., 446 U.S. 918 (1980); *People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1524 (W.D. Pa. 1985).

12. Allisions between a moving ship and a stationary or fixed object are governed by the same rules as admiralty collision cases. *See People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1523 (W.D.Pa. 1985).

D. MARITIME TORT LAW

13. Negligent conduct on the navigable waters that causes loss to another constitutes a maritime tort. *See United States v. M/V BIG SAM*, 681 F.2d 432, 443 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

14. Negligence traditionally has four elements:

   1. A duty or obligation recognized by the law requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks;
   2. A failure on the actor's part to conform to the standard required;
   3. A reasonably close causal connection between the conduct and the resulting injury (proximate cause);
   4. Actual loss or damage resulting to the interests of another.

United States v. M/V BIG SAM, 454 F. Supp. 1144, 1148 (E.D. La. 1978) (citing W. Prosser, *Law of Torts* § 30 (4th ed. 1971)) *rev'd on reconsideration on other grounds*, 480 F. Supp. 290 (E.D. La. 1979), *aff'd in part, rev'd in part on other grounds, and remanded*, 681 F.2d 432 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

14. A useful framework for determining negligence in a maritime case has been formulated by designating by "B" the burden of the precautions necessary to avert an accident, by "L" the magnitude of the loss of the accident occurred, and by "P" the probability that if the precautions were not taken the accident would occur. An alleged tortfeasor is negligent if $B < PL$, that is, if the burden of precautions was less than the harm if the accident occurred discounted (i.e., multiplied) by the probability that it would occur. The higher P and L are, and the lower B is, the likelier the finding of negligence. *See United States Fidelity & Guaranty Company v. Jadranska Slobodna Plovidba,* 683 F.2d 1022, 1026 (7th Cir. 1982); *United States v. Carroll Towing Company,* 159 F.2d 169, 173 (2d Cir. 1947).

1. Duty

15. A duty of care exists when injury is foreseeable or when contractual or other relations of the parties impose it. *See Daigle v. Point Landing, Inc.,* 616 F.2d 825, 827-28 (5th Cir. 1980).

16. In determining the existence of duty, a court must examine and weigh the probability of an accident, the potential extent of the injury, and the cost of adequate precautions. *See Complaint of Paducah Towing Company,* 692 F.2d 412, 422 & n.18 (6th Cir. 1982).

(a) Duties of the Shipowner[19] and Shipmaster

17. A master has under his command a thing which may be the instrument of damage – a craft which, once

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[19] The negligence of the master or crew of a ship is imputed to the shipowner. *See generally Boston Metals Company v. WINDING GULF,* 349 U.S. 122 (1955).

loosed, can smash all in her path. He has, therefore, a special duty to take all reasonable steps consistent with safety to his ship and her crew to avoid or minimize the chance of harm to others. *See Boudoin v. J. Ray McDermott & Company*, 281 F.2d 81, 85 (5th Cir. 1960).

Duty to Provide Sufficient Crew

18. A shipowner has a nondelegable duty to provide a competent master and crew. *See Hercules Carrier, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1565-66 (11th Cir. 1985) (unseaworthiness case). The shipowner's failure to provide an adequate crew can constitute negligence. *See Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 97 (5th Cir. 1985); *Burden v. Evansville Materials, Inc.*, 636 F. Supp. 1022, 1031 (W.D. Ky. 1986), *aff'd*, 840 F.2d 343 (6th Cir. 1988).

19. A master is negligent and unseamanlike when he leaves his vessel without sufficient manpower aboard to maneuver to avoid damage to the vessel or another structure if an emergency should arise. *See Trawler Jeanne D'Arc, Inc. v. Casco Trawlers, Inc.*, 260 F. Supp. 124, 136 (D. Me. 1966). *See also In re Ocean Foods Boat Company*, 692 F. Supp. 1253, 1259 (D. Or. 1988) (The crew must not merely be competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen).

20. A captain can be negligent in failing to instruct his crew if that failure is proximately related to the allision. *See Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1573 (11th Cir. 1985).

Duty to Obtain and Evaluate Data

21. A master can be held to have a duty to perform his functions with the skill and knowledge of an ordinary Great Lakes shipmaster recently familiar with the area. A master is negligent when he fails to inform himself when information is available about conditions regarding which an experienced master would have reason to desire information. *See Petition of M/V ELAINE JONES,* 480 F.2d 11, 21 (5th Cir. 1973), *cert. denied sub nom. Canal Barge Company, Inc. v. Griffith,* 423 U.S. 840 (1975); *Bouchard Transportation Company v. Tug Gillen Brothers,* 389 F. Supp. 77, 82 (S.D.N.Y. 1975).

22. A competent shipmaster must evaluate data continuously. *See Boudoin v. J. Ray McDermott & Company,* 281 F.2d 81, 85 (5th Cir. 1960).

23. A captain's duty to possess himself of essential knowledge exists independently of whether there is present another person who has a duty to inform the captain. Such a person might have a duty to inform the captain without being asked, but the captain still has a duty to ask. The duty of each does not negate the duty of the other or excuse the failure of each to carry out his duty. *See Petition of M/V ELAINE JONES,* 480 F.2d 11, 23 (5th Cir. 1973), *cert. denied sub nom. Canal Barge Company, Inc. v. Griffith,* 423 U.S. 840 (1975).

Duty to Monitor Weather

24. A captain has a duty to monitor weather conditions to ensure the safety of a vessel. *See Boudoin v. J. Ray McDermott & Company,* 281 F.2d 81, 84 (5th Cir. 1960);

Graham v. Milky Way Barges, Inc., 590 F. Supp. 721, 728 (E.D. La. 1984).

25. It is the nature of the calling of the shipmaster to know of the tempestuous forces of wind and tide and seas. He has to make assessments often from confusing or inadequate facts and then translate them into effective decisions. He cannot, therefore, trust to some providential intuition. He must be informed and experienced in the critical evaluation of data. Hence, he may not justify an erroneous judgment merely because others not similarly trained or charged with responsibility reached a like conclusion. *See Boudoin v. J. Ray McDermott & Company,* 281 F.2d 81, 84-85 (5th Cir. 1960). *See also* 46 C.F.R. §§ 10.05-43 & 10.05-47.

26. When a captain of a vessel secures his radio shack and thereafter fails to keep track of the course and fury of a storm, he is negligent and breaches his duty to his ship. He is not entitled to rely solely on others to keep him posted as to the course and strength of a storm. *See Trade & Transport, Inc. v. Caribbean Steamship Company,* 384 F. Supp. 782, 787 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 521 F.2d 229 (5th Cir. 1975).

27. Even though a storm is an "Act of God,"[20] a vessel has a continuing duty to use reasonable care. *See Weyerhaeuser Company v. ATROPOS ISLAND,* 777 F.2d 1344, 1349 n.4 (9th Cir. 1985).

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[20] An "Act of God" is a catastrophy [sic] which triumphs over the safeguards by which skillful and vigilent seamen normally bring a ship and cargo to safety. *See Valley Line Company v. Musgrove Towing Service,* 654 F. Supp. 1009, 1012 (S.D. Tex. 1987).

28. The unexpected nature of a violent weather condition does not operate to exonerate a master of fault if he is negligent before or after the weather condition occurs. *See Complaint of Paducah Towing Company, Inc.*, 692 F.2d 412, 422 (6th Cir. 1982); *Complaint of Chevron Transport Corporation*, 613 F. Supp. 1428, 1433 (M.D. Fla. 1985), *aff'd in part, rev'd in part and remanded on other grounds sub nom. Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied sub nom. Great Lakes Dredge and Dock Company v. Chevron Transport Corporation*, 108 S. Ct. 2017 (1988); *Trawler Jeanne D'Arc, Inc. v. Casco Trawlers*, 260 F. Supp. 124, 137 (D. Me. 1966).

Duty of Safe Mooring

29. When all details of a mooring are controlled under the supervision of the master – absent some type of contractual commitment – responsibility for the mooring of the vessel lies with the master. *See Trade Banner Line, Inc. v. Caribbean Steamship Company*, 521 F.2d 229, 231 (5th Cir. 1975).

30. A vessel must be moored in a reasonably safe place in a reasonably safe manner. The requirements of reasonable care vary with the circumstances: the more hazardous the location of a moored vessel, the greater the precautions the crew must take in its mooring. A vessel has a legal duty to be prepared to withstand the forces in a lake which are reasonably foreseeable. *See Complaint of Paducah Towing Company, Inc.*, 692 F.2d 412, 423 (6th Cir. 1982).

31. The geography of a location and the influences of the wind and tide can require a shipowner to exercise

extra care because of the extra risk. *See Georgia Ports Authority v. L/S BILDERDYK*, 402 F. Supp. 706, 711 (S.D. Ga. 1975).

32. Ordinary care requires that when a vessel is moored in a hazardous location, it must be prepared to avoid an accident if it becomes unmoored. *See Complaint of Paducah Towing Company, Inc.*, 692 F.2d 412, 425-27 & n.27 (6th Cir. 1982).

33. Even though a vessel is originally properly moored, it nevertheless has the duty to take prompt action to prevent damage when a sudden change in weather conditions makes the situation hazardous. *See Sunlight, Inc. v. F/V BLUEWATERS*, 209 F. Supp. 62, 63 (D. Mass. 1962).

34. The burden to make fast additional lines when weather and tide conditions change rests with the ship. *See Weeks Stevedoring Company, Inc. v. Alexandria Navigation Corporation, Ltd. Panama*, 353 F. Supp.1069, 1072 (S.D.N.Y. 1973).

35. It is not in all cases a sufficient answer to a master's absence during working hours that he has properly made fast his vessel to a pier when he leaves her. *See United States v. Carroll Towing Company*, 159 F.2d 169, 173 (2d Cir. 1947).

(b) Duties of the Wharfinger

36. The Board of Harbor Commissioners of the City of Milwaukee has exclusive control over the commercial aspects of the day-to-day operation of the public harbor and public harbor facilities and may assign berths at

publicly-owned or leased harbor facilities. *See* Wis. Stat. § 30.38(8)(a)(3).

37. If a wharf manager has the right to determine at what part of the pier a vessel is to be moored, the wharfinger has the duty to exercise reasonable care for her protection. The care to be exercised must be in proportion to the danger to be avoided. *See THE JOHN CARROLL*, 275 F. 302, 306 (2d Cir. 1921).

Duty to Provide Safe Berth

38. A wharfinger is not the guarantor of the safety of a ship coming to his wharf. When it invites a party to use its dock facilities, it is, however, under a duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to it and not reasonably known to the shipowner. *See Smith v. Burnett*, 173 U.S. 430, 433 (1898); *United States v. Mowbray's Floating Equipment Exchange, Inc.*, 601 F.2d 645, 646 (2d Cir. 1979); *Bunge Corporation v. M/V FURNESS BRIDGE*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Trade Banner Line, Inc. v. Caribbean Steamship Company, S.A.*, 521 F.2d 229, 230 (5th Cir. 1975); *Schwerman Trucking Company v. Gartland Steamship Company*, 496 F.2d 466, 477 (7th Cir. 1974); *Medomsley Steam Shipping Company v. Elizabeth River Terminals, Inc.*, 354 F.2d 476, 480 (4th Cir. 1966); *Slater Fireproof Storage Company v. Nicholson Transit Company*, 47 F.2d 734, 735 (7th Cir. 1931).

39. There is no duty on the part of a wharfinger to provide a berth with safe surroundings (other than an entrance and exit) or to warn that hazards exist in its vicinity. *See Trade Banner Line, Inc. v. Caribbean Steamship Company*, 521 F.2d 229, 230 (5th Cir. 1975); *Amarada Hess Corporation v. M/T MARIAM*, 533 F. Supp. 158, 166 (S.D. Ala. 1982).

40. A master who is unfamiliar with a harbor has a right to rely on assurances from a wharfinger that a berth is safe. *See Venore Transportation Company v. Oswego Shipping Corporation*, 498 F.2d 469, 471-72 (2d Cir.), *cert. denied sub nom. Banco Do Brasil v. Venore Transportation Company*, 419 U.S. 998 (1974).

41. Where the owner of a vessel berthed at a wharf and the owner's employees have daily access to the vessel, there is no inference of negligence of a wharfinger, even where a bailment exists, when the vessel sinks at the wharf. *See United States v. Mowbray's Floating Equipment Exchange, Inc.*, 601 F.2d 645, 647 (2d Cir. 1979).

Duty to Warn

42. A wharfinger's failure to warn a shipowner does not breach the wharfinger's duty of ordinary care unless the resultant harm is reasonably foreseeable. Liability for a failure to warn arises from foreseeability, or the knowledge that particular conduct will create danger. The care which must be exercised in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. The degree of care necessary to constitute the ordinary care required of a person upon any particular

occasion is measured by reference to the circumstances of danger and risk known to such person at the time. Conduct which will be considered extremely careful under one condition of knowledge, and one state of circumstances, may be grossly negligent with different knowledge and in changed circumstances. *See Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir. 1980) (citing 57 Am. Jur. 2d *Negligence* § 72 (1971) at 423). *See also Counts v. Lafayette Crewboats, Inc.*, 622 F. Supp. 299, 301 (W.D. La. 1983) (duty to warn of reasonably anticipated dangers).

43. Knowledge includes both actual and constructive knowledge. A party has a duty to warn only if the party has knowledge, or, in the use of ordinary care should have knowledge, of a dangerous condition. *See Drejerwski v. C.G. Willis, Inc.*, 587 F. Supp. 1515, 1519 (E.D. Pa. 1984).

44. The wharfinger's duty to warn applies only to any hidden hazard or deficiency reasonably known to the shipowner. No warning is required where the alleged obstruction or condition is open and obvious to those in charge of the vessel's management or where those in control of the vessel have actual knowledge or should have knowledge. *See Bunge Corporation v. M/V FURNESS BRIDGE*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 453 U.S. 924 (1978); *Grace Line, Inc. v. Todd Shipyards Corporation*, 500 F.2d 361, 365 (9th Cir. 1974); *Amarada Hess Corporation v. M/T MARIAM*, 533 F. Supp. 158, 166 (S.D. Ala. 1982).

45. The failure of the wharfinger to warn a captain of the change of the course of a storm in time for him to take his vessel out of a berth does not constitute a lack of

reasonable diligence. *See Trade & Transport, Inc. v. Caribbean Steamship Company,* 384 F. Supp. 782, 787 (S.D. Tex. 1974), *aff'd in part, rev'd in part on other grounds,* 521 F.2d 229 (5th Cir. 1975).

46. In admiralty, even if a party has no duty to warn, once the party undertakes to perform the safety function of providing a warning, it must do so adequately and without negligence. *See Estate of Callas v. United States,* 682 F.2d 613, 622 & n.12 (7th Cir. 1982).

2. Foreseeability of Injury

47. Foreseeability of danger is necessary to render conduct negligent. *See Petition of Kinsman Transit Company,* 338 F.2d 708, 724 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Company v. City of Buffalo,* 380 U.S. 944 (1965).

48. Where damages result from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not preclude liability. *See Petition of Kinsman Transit Company,* 338 F.2d 708, 726 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Company v. City of Buffalo,* 380 U.S. 944 (1965). It is sufficient that a danger from any number of probable causes is reasonably apparent. *See Complaint of Hercules Carriers, Inc.,* 566 F.Supp. 962, 977 (M.D. Fla. 1983), *aff'd, Hercules Carriers, Inc. v. Claimant State of Florida,* 768 F.2d 1558 (11th Cir. 1985).

49. Where the harm which in fact results is caused by factors or forces which form no part of the recognizable risks involved in the actor's conduct, the actor is not liable. *See United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624, 632 (3d Cir. 1979).

3. Standard of Care and Breach

50. In a negligence action under the general maritime law, the standard of care required is that of ordinary diligence under the circumstances. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

51. Those who undertake any work calling for special skill "are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability." *Petition of M/V ELAINE JONES*, 480 F.2d 11, 20 (5th Cir. 1973), quoting W. Prosser, *Law of Torts* § 32 (1971 ed.), *cert. denied sub nom. Canal Barge Company, Inc. v. Griffith*, 423 U.S. 840 (1975).

52. What the ordinary prudent shipmaster would do under circumstances is not to be measured by what ordinary persons did or ought to have done. *See Boudoin v. J. Ray McDermott & Company*, 281 F.2d 81, 84 (5th Cir. 1960).

53. In an allision case, the test is whether, judged against the standard of good and prudent seamanship, the allision could have been prevented by the exercise of due care. *See Weeks Dredging & Contracting, Inc. v. B. Turecamo Towing Corporation*, 482 F.Supp. 1053, 1056 (E.D.N.Y. 1980).

54. A vessel's conduct is measured against accepted standards of navigation. These standards are derived from the statutory rules of navigation, regulations having the full force of law, proved local custom not contradicting statutory rules, and the requirements of due care and good seamanship. Collectively, these rules prescribe a vessel's conduct in all circumstances including inclement weather. *See People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1523 (W.D. Pa. 1985).

55. Breach of a statutory rule or regulation can constitute fault. *See First National Bank of Chicago v. Material Service Corporation*, 597 F.2d 1110, 1116-17 (7th Cir. 1979). Statutory fault is a doctrine conceptually akin to the negligence per se doctrine. *See Peoples Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1524 (W.D. Pa. 1985).

56. Compliance with all statutory rules is not alone sufficient to avoid liability. The ordinary standards of good seamanship, i.e., due care, and the general concept of negligence, remain applicable to all parties. Thus, liability for an allision may be imposed even in the absence of a statutory violation, if there is negligence. *See First National Bank of Chicago v. Material Service Corporation*, 597 F.2d 1110, 1117 (7th Cir. 1979).

57. A custom may be taken into account to determine the reasonableness of conduct in certain circumstances, but it is not conclusive. *See Complaint of Paducah Towing Company*, 692 F.2d 412, 426 (6th Cir. 1982).

58. Customary practices on the Great Lakes are factors which may be considered in determining whether a party to an admiralty action was negligent. *See, e.g.*,

Schwerman Trucking Company v. Gartland Steamship Company, 496 F.2d 466, 476-77 (7th Cir. 1974).

59. Custom is not a defense to a charge of negligence. However, it is a material consideration, especially where the victim and the alleged tortfeasor are linked, even if indirectly, in a voluntary relationship. *See United States Fidelity & Guaranty Company v. Jadranska Slobodna Plovidba,* 683 F.2d 1022, 1028 (7th Cir. 1982).

60. A generally accepted industrial practice will not shield a vessel from liability where the risks of injury are substantial and foreseeable. *See Complaint of Paducah Towing Company, Inc.,* 692 F.2d 412, 426 (6th Cir. 1982).

61. A party is not required to take every possible precaution; it is required to do what a reasonable person would do under the circumstances. *Counts v. Lafayette Crewboats, Inc.,* 622 F. Supp. 299, 301 (W.D. La. 1983).

4. Cause

62. Fault which produces liability must be a contributing or proximate cause of the allision. *See THE JAVA,* 81 U.S. (14 Wall.) 189 (1872); *THE FARRAGUT,* 77 U.S. (10 Wall.) 334 (1870); *Harbor Tug & Barge, Inc. v. Belcher Towing Company,* 733 F.2d 823, 826 (11th Cir. 1984); *United States v. Mowbray's Floating Equipment Exchange, Inc.,* 601 F.2d 645, 646 (2d Cir. 1979); *First National Bank of Chicago v. Material Service Corporation,* 597 F.2d 1110, 1116 (7th Cir. 1979).

5. Comparative and Contributory Fault

63. In admiralty, when two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. *See United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 411 (1975); *Trinidad Corporation v. S.S. KEIYOU MARU*, 845 F.2d 818, 822 (9th Cir. 1988); *S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 165 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

64. Liability is to be allocated among the parties proportionately to the comparative degree of their fault. Under this standard it is culpability, not the degree of physical causation on which liability is apportioned. *See Harbor Tug & Barge, Inc. v. Belcher Towing Company*, 733 F.2d 823, 825 (11th Cir. 1984); *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir. 1980); *In re Ocean Foods Boat Company*, 692 F. Supp. 1253, 1264 (D. Okla. 1988); *People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1523 (W.D. Pa. 1985); *Cumberland County Utilities Authority v. M/T DELBAR*, 604 F. Supp. 383, 389 (D.N.J. 1985).

65. A plaintiff is not entitled to recover damages for any harm that it could have avoided by use of reasonable effort or expenditure after the commission of a tort. The reasonableness of a plaintiff's act or omission depends on the extent of threatened injury, as compared with the expense of remedying the situation, and the practical

certainty of success in preventive effort. *See S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 168-70 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

66. Failure to act as one should may constitute contributory negligence. *See S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

67. In admiralty law contributory negligence operates as comparative negligence. A plaintiff is contributorily negligent when its conduct falls below the standard to which it is required to conform for its own protection. The standard is that of a reasonable person under like circumstances. Plaintiff's negligence is disregard for its own safety and not necessarily such as threatens to invade any of defendant's legal rights. Contributory negligence does not involve breach of any duty owed others but, rather, a failure reasonably to safeguard one's own property. *See S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

68. One may be guilty of negligence in the care of one's own property and thus suffer a reduction of recoverable damages, even though such negligence would not be actionable in a claim by another. *See S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

69. In admiralty, contributory negligence does not bar a plaintiff's claim but only serves to lessen its recoverable damages in proportion to its fault as compared to defendant's. *See S.C. Loveland, Inc. v. East West Towing,*

Inc., 608 F.2d 160, 168 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

6. Burden of Proof

70. In this maritime action, the claimants bear the burden of proving their negligence claims and counterclaims by a preponderance of the evidence.[21] *See People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1526 (W.D. Pa. 1985).

7. Presumptions

71. A presumption is a rule of law attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence. The "presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it." *People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1524 (W.D. Pa. 1985), quoting 9 J. Wigmore, *Wigmore on Evidence* § 2491, at 304 (Chadbourn rev. ed. 1981).

72. Under the Federal Rules of Evidence, presumptions place upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic fact. *See* Federal Rule of Evidence 301. *See also People's Natural Gas Company v. Ashland Oil, Inc.*, 604 F. Supp. 1517, 1525 (W.D. Pa. 1985).

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[21] This burden also applies to the plaintiff's breach of warranty claims.

73. A presumption affects the burden of proof, not merely the burden of going forward with the evidence. *See Bunge Corporation v. M/V FURNESS BRIDGE*, 558 F.2d 790, 795 n.3 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

(a) The Rule of THE PENNSYLVANIA

74. When "a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." THE PENNSYLVANIA, 86 U.S. (19 Wall.) 125, 136 (1874); *Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540, 1554-55 (11th Cir. 1987), *cert. denied sub nom. Great Lakes Dredge and Dock Company v. Chevron Transport Corporation*, 108 S.Ct. 2017 (1988).

75. The PENNSYLVANIA Rule applies only to violations of a mandatory statute or regulation designed to prevent a collision.[22] *See Williamson Leasing v. American Commercial Lines*, 616 F. Supp. 1330, 1339 (E.D. La. 1985).

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[22] *But see First National Bank of Chicago v. Material Service Corporation*, 597 F.2d 1110, 1116 n.9 (7th Cir. 1979) (violation of a general navigation rule creates the same burden as that created by violation of a statutory rule); *People's Natural Gas*

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76. As a matter of law, the S.S. E.M. FORD did not violate any statute or regulation having the force of law.

(b) The Rule of THE LOUISIANA

77. When a vessel breaks free from its moorings and strikes a stationary object, there is a presumption that the vessel is at fault unless the vessel proves that the allision was the fault of the stationary object, that the moving ship acted with reasonable care, or that the allision was the result of inevitable accident, or a *vis major,* which human skill and precaution and a proper display of nautical skill could not have prevented. *See THE LOUISIANA,* 70 U.S. (3 Wall.) 173, 173-74 (1865). *See also THE OREGON,* 158 U.S. 186 (1895); *American Petrofina Pipeline Company v. M/V SHOKO MARU,* 837 F.2d 1324, 1326 (5th Cir. 1988); *Mount Washington Tanker Company v. Wahyuen Shipping, Inc.,* 833 F.2d 1541, 1542 (11th Cir. 1987); *Weyerhaeuser Company v. ATROPOS ISLAND,* 777 F.2d 1344, 1347 (9th Cir. 1985); *James v. River Parishes Company, Inc.,* 686 F.2d 1129, 1132 (5th Cir. 1982); *Woods v. United States Department of Transportation,* 681 F.2d 988, 990 (5th Cir. 1982); *Bunge Corporation v. M/V FURNESS BRIDGE,* 558 F.2d 790, 794 (5th Cir. 1977), *cert. denied,* 435 U.S. 924 (1978); *Petition of M/V ELAINE JONES,* 480 F.2d 11, 17 (5th Cir. 1973), *cert. denied sub nom. Canal Bridge Company, Inc.*

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Company v. Ashland Oil, Inc., 604 F. Supp. 1517, 1524 (W.D. Pa. 1985) ("It remains an open question whether regulations requiring due care in navigation make all maritime negligence claims a mater of statutory fault").

v. Griffith, 423 U.S. 840 (1975); *Swenson v. THE ARGONAUT,* 204 F.2d 636, 640 (3d Cir. 1953); *THE PRESIDENT MADISON,* 91 F.2d 835, 837 (9th Cir. 1937).

78. When a drifting vessel causes damage, an inference arises as a matter of law that the vessel was adrift through negligence. Such an inference is called a rebuttable presumption. The custodian of the drifting vessel bears the burden of disproving fault by a preponderance of the evidence. In other words, the custodian bears the burden of persuasion (or bears the risk of nonpersuasion) as well as the burden of production. *See American Petrofina Pipeline Company v. M/V SHOKO MARU,* 837 F.2d 1324, 1326 (5th Cir. 1988); *Weyerhaeuser Company v. ATROPOS ISLAND,* 777 F.2d 1344, 1348 (9th Cir. 1985); *James v. River Parishes Company, Inc.,* 686 F.2d 1129, 1133 (5th Cir. 1982).[23]

79. The presumption of negligence applies to the operator as well as to the vessel and works against all parties participating in the management of the vessel at the time of contact. *See Woods v. United States Department of Transportation,* 681 F.2d 988, 990 (5th Cir. 1982).

80. The rebuttable presumption that a moving ship is at fault for a collision with a stationary object applies in cases in which damage occurs to parts of wharves designated to come into contact with a ship. *See American*

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[23] Some courts follow the "bursting bubble" theory of presumption under which the presumption disappears as a matter of law once the opponent of the presumption meets its burden of production. *See, e.g., Pennsylvania Railroad Company v. S.S. MARIE LEONHARDT,* 320 F.2d 262, 264 (3d Cir. 1963).

Petrofina Pipeline Company v. M/V SHOKO MARU, 837 F.2d 1324, 1326 (5th Cir. 1988).

81. When a berthing facility has been damaged, the shipowner may rebut the presumption of negligence by proving that the wharfinger violated the standard of care to which it is held and that this violation was the proximate cause of the damage claimed. *See Bunge Corporation v. M/V FURNESS BRIDGE*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

82. A vessel which breaks free from its moorings and strikes an owner's dock is required to prove that it used reasonable care under the circumstances to avoid hitting the dock. *See Weyerhaeuser Company v. ATROPOS ISLAND*, 777 F.2d 1344, 1347-48 (9th Cir. 1985).

83. The defense of inevitable accident is not available when those in charge of the navigation of a vessel have, through their negligent and imprudent seamanship, placed the vessel in a dangerous circumstance where it is too late to avoid the accident. *See Complaint of Hercules Carriers, Inc.*, 566 F.Supp. 962, 978 (M.D. Fla. 1983), *aff'd sub nom. Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558 (11th Cir. 1985).

8. Liability

(a) Liability for Harm to the S.S. E.M. FORD

84. Defendant City of Milwaukee had a legal duty to exercise due care for the plaintiff Cement Division's property, the S.S. E.M. FORD.

85. Defendant City of Milwaukee's breach of its legal duty to exercise due care for the plaintiff Cement Division's property was a proximate cause of the harm which occurred to the E.M. FORD on December 24 and 25, 1979.

86. Defendant City of Milwaukee is liable to the plaintiff Cement Division for its proportionate share of the fault which resulted in the damage to the E.M. FORD.

87. Plaintiff Cement Division had a legal duty to exercise due care for its own property, the S.S. E.M. FORD.

88. Plaintiff Cement Division's breach of its legal duty to exercise due care for its own property was a contributory cause of the harm which occurred to the S.S. E.M. FORD on December 24 and 25, 1979.

89. Plaintiff Cement Division's contributory negligence lessens its recoverable damages in proportion to its fault as compared with the fault of the City of Milwaukee.

90. Third party defendant Edward E. Gillen Company did not breach any legal duty to exercise due care for the plaintiff Cement Division's property, the S.S. E.M. FORD.

91. Third party defendant Edward E. Gillen Company is not liable to plaintiff Cement Division for any of the damage to the S.S. E.M. FORD.

(b) Liability for Harm to the City of Milwaukee Dock

92. Plaintiff Cement Division had a legal duty to use due care for the dock and other property of the City of Milwaukee.

93. Plaintiff Cement Division's breach of its legal duty to exercise due care for the dock and other property of the City of Milwaukee was a proximate cause of the harm which occurred to the dock and other property of the City of Milwaukee on December 24 and 25, 1979.

94. Plaintiff Cement Division is liable to the defendant City of Milwaukee for its proportionate share of the fault which resulted in the damage to the dock and other property of the City.

95. Defendant City of Milwaukee had a legal duty to exercise due care for its own dock and other property.

96. Defendant City of Milwaukee's breach of its duty to exercise due care for its own property was a contributory cause of the harm which occurred to its dock and other property on December 24 and 25, 1979.

97. Defendant City of Milwaukee's contributory negligence lessens its recoverable damages in proportion to its fault as compared to the fault of the plaintiff Cement Division.

9. Damages

98. Plaintiff Cement Division is entitled to be compensated by money damages for the injury to its property, the S.S. E.M. FORD.

99. Defendant City of Milwaukee is entitled to be compensated by money damages for the injury to its dock and other property.

E. MARITIME WARRANTY LAW

1. Implied and Express Warranties

100. As a matter of law, the defendant City of Milwaukee did not expressly warrant to plaintiff Cement Division that Terminal No. 1, South Slip No. 1 was a safe berth for the temporary layup of the S.S. E.M. FORD which began on December 21, 1979.

101. The implied warranties of a wharfinger are coextensive with the wharfinger's duties under tort law. *See Schwerman Trucking Company v. Gartland Steamship Company,* 496 F.2d 466, 474 (7th Cir. 1974). *Compare Sims v. Chesapeake and Ohio Railway Company,* 520 F.2d 556, 561 (6th Cir. 1975) (implied warranties of wharfinger) *with United States v. Mowbray's Equipment Exchange, Inc.,* 601 F.2d 645, 646 (2d Cir. 1979) (standard of care of wharfinger).

102. The relationship between a shipowner and a wharfinger includes the implied warranties of providing a safe berth and workmanlike services. The implied warranty of a safe berth relates to the conditions of berths and the removal of dangerous obstructions or giving notice of their existence to vessels about to use the berths. The nature of the services performed by the wharfinger determines the extent of the warranty of workmanlike service. *See Oglebay Norton Company v. CSX Corporation,* 788 F.2d 361, 365 (6th Cir.), *cert. denied,* 107 S. Ct. 173

(1986); *Sims v. Chesapeake and Ohio Railway Company,* 520 F.2d 556, 561 (6th Cir. 1975). *See also Complaint of McAllister Brothers, Inc.,* 609 F. Supp. 616, 620 (E.D. Pa. 1985) (Failure to warn of a hazardous navigational condition is not a breach of the warranty of workmanlike service. The implied warranty of workmanlike service generally applies to contracts for ship repair; it does not encompass a duty to warn.)

2. Indemnity

103. Some relationships between a shipowner and a wharfinger can give rise to an implied right to indemnity. In such situations a shipowner is entitled to indemnity when a breach of the wharfinger's warranty of workmanlike performance results in loss absent conduct on the shipowner's part sufficient to preclude recovery. *See Oglebay Norton Company v. CSX Corporation,* 788 F.2d 361, 366 (6th Cir.), *cert. denied,* 107 S. Ct. 173 (1986).

104. Conduct sufficient to preclude recovery is conduct which prevented or seriously hampered a contractor's performance of its duty in accordance with its warranty of workmanlike service. *See Oglebay Norton Company v. CSX Corporation,* 788 F.2d 361, 366 (6th Cir.), *cert. denied,* 107 S. Ct. 173 (1986).

105. Comparative fault has no meaning in an indemnity action. *See Oglebay Norton Company v. CSX Corporation,* 788 F.2d 361, 367 n.13 (6th Cir.), *cert. denied,* 107 S. Ct. 173 (1986).

3. Liability

106. Defendant City of Milwaukee is not liable to the plaintiff Cement Division for breach of any express warranties relating to the temporary layup of the S.S. E.M. FORD which began on December 21, 1979.

107. Defendant City of Milwaukee is liable to the plaintiff Cement Division for breach of a wharfinger's implied warranty of providing a safe berth.

108. No relationship between plaintiff Cement Division and the defendant City of Milwaukee gives rise to an implied right of Cement Division to be indemnified for the City's breach of the implied warranties of a wharfinger.

III. DISCUSSION

A. PRESUMPTIONS AND BURDEN OF PROOF

Under general principles of tort law a plaintiff such as Cement Division would ordinarily have the burden of proving by a preponderance of the evidence that the defendant's negligence was a proximate cause of its injuries and, a defendant such as the City of Milwaukee would have the same burden in proving its counterclaim. However, under maritime law presumptions have developed which can shift and alter the burden of proof.

1. The Rule of THE PENNSYLVANIA

One of these venerable presumptions is the rule of THE PENNSYLVANIA, which derives from a case in which the United States Supreme Court established a stringent burden of proof for a vessel in violation of a statutory safety requirement. *See THE PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1873). That case involved a collision between a bark and a steamer in a dense fog. *Id.* at 126-27. The bark was not sounding the appropriate fog signals, in contravention of an earlier act of Congress for preventing collisions at sea. In weighing the fault of the bark, the Supreme Court said:

> [W]hen, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.

Id. at 136. This rule has been applied in the Seventh Circuit. *See, e.g., First National Bank of Chicago v. Material Service Corporation*, 597 F.2d 1110, 1117 (7th Cir. 1979).

In order to satisfy the burden imposed by THE PENNSYLVANIA rule, the violator must show not merely that its fault might not have been one of the causes of the collision but also that it could not have been one of the causes.[24] The burden of proof imposed by THE

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[24] It should be noted that the PENNSYLVANIA rule concerns only the burden of proof for showing causation; it does not determine ultimate liability for damages. *See Sheridan Transportation Company v. United States*, 834 F.2d 467, 478 (5th Cir. 1987). Moreover, the rule concerns only the question of

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PENNSYLVANIA rule has been described as "difficult" if not "impossible" to discharge. *See Ishizaki Kisen Company v. United States,* 510 F.2d 875, 879 (9th Cir. 1975). Some courts have held that in order to escape liability a ship in violation of a statutory safety rule must prove beyond a reasonable doubt that the collision would have occurred anyway. *See, e.g., Oriental Trading and Transportation Company v. Gulf Oil Corporation,* 173 F.2d 108, 109 (2d Cir.), *cert. denied sub nom. Gulf Oil Corporation v. M/V THE JOHN A. BROWN,* 337 U.S. 919 (1949). Other courts have said that the burden imposed under THE PENNSYLVANIA rule is discharged by a clear and convincing showing of no proximate cause. *See, e.g., Trinidad Corporation v. S.S. KEIYOH MARU,* 845 F.2d 818, 825 (9th Cir. 1988).

Under either standard, application of THE PENNSYLVANIA rule would be of great benefit to the party invoking it. Consequently, at trial the City of Milwaukee has spent a great deal of time attempting to show that the E.M. FORD was in violation of a rule promoting safety. The City took the position that, by tying up the E.M. FORD in the outer harbor in Milwaukee for a period of days during the month of December, Cement Division violated the United States Salvage Association regulation which provides that winter mooring will not be approved in the outer harbor at the Port of Milwaukee. *See* Exhibits 586 & 596A.

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whether the alleged statutory violation was one of the collision's causes. The rule does not exonerate other parties whose negligence may also have been a cause. *See Crown Zellerbach Corporation v. Willamette-Western Corporation,* 519 F.2d 1327, 1329 (9th Cir. 1975).

From 1912 through 1966, the United States Salvage regulations were published in the annual reports of the plaintiff Great Lakes Protective Association (G.L.P.A.). *See* Transcript at 2103-2209 (Testimony of John Hanninen). While the evidence established that Cement Division, a member of the G.L.P.A., had actual knowledge of these winter mooring regulations and that, nevertheless, it tied up the E.M. FORD in the outer harbor at the Port of Milwaukee in the winter of 1979, these facts do not warrant invoking the rule of THE PENNSYLVANIA. The City failed to establish that the United States Salvage regulations are intended to prevent an allision or that they apply to temporary lay ups. More importantly, the defendant presented no authority for the proposition that these regulations have the force of law. The United States Salvage Association is merely a private association of marine surveyors who promulgated these regulations as guidelines for approving and warranting inspections of winter moorings for insurance purposes.

Cement Division raised substantial doubt that these regulations were in current use. They had not been published by the G.L.P.A. since 1966 and were in the process of being revised in 1979. *See* Transcript at 2103-2209 (Testimony of John Hanninen), 1377-90 (Testimony of James Sherman); Exhibits 213 & 213A (Deposition of True LeMon at 13, 23-30 & 34). While there was no showing that the particular regulation prohibiting winter mooring in Milwaukee's outer harbor was unsound or under revision, the plaintiffs were able to show that the regulations as a whole were not being enforced or utilized except on a case-by-case basis. The City concedes as much in its posttrial brief by admitting that the United States Salvage

Association regulations are relevant mainly because "they give notice to the Cement Division that an unmanned vessel should not be moored in the outer harbor in winter." Reply Brief of Defendant and Third-Party Plaintiff City of Milwaukee at 6.

The City also attempts to argue that Cement Division violated federal laws, 46 U.S.C.A. §§ 8101 ("Complement of inspected vessels"), 8104 ("Watches") & 8301 ("Minimum number of licensed individuals") (West Supp. 1989), by not ensuring that the E.M. FORD was adequately manned during the temporary lay up. *See* Brief of Defendant and Third-Party Plaintiff City of Milwaukee at 19-20. But, as Cement Division points out, these "statutes clearly state that their provisions apply to vessels in 'operation' and 'on a voyage.' " Plaintiffs' Post-Trial Brief at 13-14.

2. The Rule of THE LOUISIANA

Clearly, the rule of THE PENNSYLVANIA does not apply in this case. Instead, the City maintains that another well-settled presumption arising under the rule of THE LOUISIANA should be invoked. In the case of *THE LOUISIANA* the Supreme Court held that when a vessel breaks free from its moorings and strikes a stationary object, there is a presumption that the vessel is at fault unless the vessel proves that the allision was the fault of the stationary object, or that the moving ship acted with reasonable care, or that the allision was the result of inevitable accident, or an Act of God, which human skill and precaution and a proper display of nautical skill could not have prevented. *See* THE LOUISIANA, 70 U.S. (3 Wall.) 173, 173-74 (1865). A breakway establishes a prima facie case of negligence against the moving vessel and an inference arises that the vessel was adrift through negligence. *See James v. River Parishes Company, Inc.*, 686 F.2d 1129, 1132-33 (5th Cir. 1982). Thus, the custodian of the drifting vessel bears the burden of disproving fault by a preponderance of the evidence. *See American Petrofina Pipeline Company v. M/V SHOKO MARU*, 837 F.2d 1324, 1326 (5th Cir. 1988).

It is undisputed that the E.M. FORD broke loose from her moorings on December 24, 1979, and struck the City's dock. Cement Division made no attempt to show that this allision was the result of inevitable accident or an Act of God. Instead, the plaintiff attempted to show that the breakaway was caused by the City's failure to warn the vessel of the surge hazard and to order the FORD to remain manned or move away from the dock and by Gillen's failure to call Cement Division for help after it found the ship in distress. Once Cement Division proved causal negligence on the part of the City, the pure comparative negligence system applied.[25] *See S.C. Loveland,*

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[25] This result comports with the emerging view that the rules of THE PENNSYLVANIA and THE LOUISIANA have outlived their usefulness under the system of pure comparative negligence in maritime cases adopted by the United States Supreme Court in *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 411 (1975). *See, e.g., California v. Italian Motorship ILICE*, 534 F.2d 836, 840 (9th Cir. 1976). *But see, e.g., Florida East Coast Railway Company v. Revilo Corporation*, 637

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Inc. v. East West Towing, Inc., 608 F.2d 160, 165 n.3 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

B. FAULT BASED LIABILITY

On the evening of December 21, 1979, as the S.S. E.M. FORD approached the Milwaukee Harbor on what would be her final voyage of the 1979 season, the captain and crew were eager to tie up the vessel and depart for their holiday destinations. But the next morning the FORD's captain, Patrick Gallagher, received the unwelcome news from Cement Division headquarters that the FORD's layup would only be temporary and that the ship was to make another delivery of dry cement after Christmas.

By Friday, December 21, most of the other people who would later be called as witnesses in this case had already left work to enjoy a long weekend. Retired Rear Admiral Roy Hoffman, Milwaukee's Port Director, for one, had gone to Washington, D.C. to visit relatives and would not learn about the sinking of the FORD until he read about it in the Washington Post. *See* Transcript at 1137 & 1119 (Testimony of Roy Hoffman). Christmas Day fell on a Tuesday in 1979, so all employees of the City of Milwaukee were on vacation from Friday evening until Wednesday morning. *See* Transcript at 1787-92 (Testimony of Dean Honadel); 1171 (Testimony of Stanley Blawas). This left only a lone security guard patrolling the Port of Milwaukee. *See* Transcript at 918-22 (Testimony of Wright

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F.2d 1060, 1068 (5th Cir. 1981) ("The Pennsylvania rule survived the Supreme Court's decision in *United States v. Reliable Transfer*").

Garvey). Even the United States Coast Guard Station located one-and-one-half miles southeast of South Slip No. 1 was being manned by a single officer. *See* Transcript at 1988-89, 1978 (Testimony of Salvatore Gumina).

At the Edward E. Gillen Company in Milwaukee few employees were being carried on the winter payroll. *See* Transcript at 1979 (Testimony of Salvatore Gumina). At Cement Division headquarters in Southfield, Michigan the holiday began early. By December 21, Fleet Captain Eugene Stafford and Vessel Superintendent James Gaskell were already vacationing out of town. *See* Transcript at 396-99 (Testimony of James Gaskell), 243 (Testimony of Eugene Stafford). After informing Captain Gallagher of the change in orders on December 22, Fleet Engineer Norman Martinson also left headquarters to return to his home in Alpena, Michigan. Later that day Captain Gallagher discharged the entire crew of the E.M. FORD and he and the crew departed, leaving only five "volunteers" aboard.

The weather did not take a holiday. On December 24, just two days after the FORD's captain and crew departed, gale-force winds and high waves fomented dangerous surging in South Slip No. 1 where the E.M. FORD was tied up. Buffeted by the wind and waves, the FORD broke loose from her moorings and was sent crashing against the City's dock wall until holes ripped in her hull. By Christmas Day the FORD had sunk to the bottom of the slip.

In this instance Cement Division's business decision to discharge the crew and allow the captain to return to his home in Alpena, Michigan proved costly. In its prayer for relief, Cement Division claims that the damages to the E.M. FORD and its cargo of "dry" cement amounted to six and one half million dollars. The City claims that its dock sustained another quarter million dollars in damages.

1. Fault of the City of Milwaukee

Cement Division commenced this lawsuit seeking compensation for its multimillion dollar loss from the City of Milwaukee. According to Cement Division, there were only two ways to have prevented the sinking of the FORD. The plaintiff says that:

> Based on the testimony of all the witnesses who testified on the subject . . . there were only two procedures which could have been followed to absolutely [sic] prevent the disaster which occurred on December 24, 1979. The first and foremost was never to have permitted or placed the E.M. FORD at Terminal No. 1 in Slip No. 1 for a temporary lay-up. The second was to permit or place the E.M. FORD at Terminal No. 1 in Slip No. 1 in a temporary lay-up position only if there was sufficient crew left aboard to be able to move the vessel out of the slip to a different berth immediately in the event of an emergency.

Plaintiffs' Post-Trial Brief at 14. In other words, the plaintiff's theory of negligence liability is that the "unique characteristics" of South Slip No. 1 allowed high waves and turbulence to develop there; that the City had actual knowledge of this possibility; and that, therefore, the City had a legal duty to warn or take precautions.[26]

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[26] In connection with its theory of duty, Cement Division is attempting to impose the higher standard of care of a common carrier upon the City. Cement Division argues that:

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(a) Factual Basis

The circumstances Cement Division alleged as the factual predicate for applying these legal duties are not the same as the facts established at trial. Before the court

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> While the duty of care to provide a safe berth and to warn of any hidden or dangerous conditions unknown to the shipowner is the duty to exercise reasonable care under the circumstances, or the same degree of care as that exercised by public and private wharfingers under the same or similar circumstances, it is a duty to exercise a high degree of care.

Plaintiffs' Post-Trial Brief at 12. The plaintiff derives this theory from another case tried in this district in which the district judge observed that:

> I think it appropriate to say that in my opinion the City of Milwaukee in operating harbor and dock facilities is a general wharfinger and, as such, has legal duties and obligations similar to those of a common carrier.

Paper Makers Importing Company v. City of Milwaukee, 165 F. Supp. 491, 503 (E.D. Wis. 1958). The *Paper Makers* case was brought by importers of cargo against the City of Milwaukee's Harbor Commission for breach of a contract after the City failed to unload the plaintiff's cargo due to labor strife. Despite the dicta quoted above, the court can find no authority in maritime negligence law that holds a wharfinger to a standard higher than "reasonable care under the circumstances," even though courts may sometimes use stronger language. *See Amerada Hess Corporation v. M/T MARIAM,* 533 F. Supp. 158, 167 (S.D. Ala. 1982). *See also Weyerhaeuser Company v. ATROPOS ISLAND,* 777 F.2d 1344, 1347-48 (9th Cir. 1985) (ship owner held to duty to exercise ordinary care). Therefore, the court rejects Cement Division's proposal that the City be held to the "highest degree of care" standard of a common carrier.

could decide whether the City had these duties, it had to pare away the irrelevant facts and the allegations which were not proved by a preponderance of the evidence.

Cement Division's position is that these duties stem from the November 15, 1979 "contract" between Cement Division's Fleet Captain Eugene Stafford and Milwaukee's Dock Superintendent Stanley Blawas which gave rise to the common-law duties and implied warranties of a wharfinger and port director to provide a safe berth and workmanlike service.[27] The plaintiff insists that the City is liable for misrepresentation because, before accepting the City's offer of Terminal No. 4 at Slip No. 2 as a winter mooring berth for the E.M. FORD, Blawas assured Stafford that the berth was safe. However, because of a change in orders, the E.M. FORD was never tied up at Terminal No. 4. Therefore, any representations or misrepresentations made concerning the safety of this berth are irrelevant.

As the E.M. FORD approached the Milwaukee Harbor on December 21, 1979, Captain Gallagher radioed Stanley Blawas and told him, in effect, that the November 15 "contract" was cancelled and that the company now planned to moor the E.M. FORD at its own terminal in the inner harbor for the winter. Meanwhile, the ship needed a berth where it could wait for a brief period of time until the FORD's sister ship, the S.T. CRAPO, arrived and unloaded at the Cement Division dock.

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[27] A party may be liable in tort for breaching an independent duty towards another, even where the relationship creating such a duty originates in the parties' contract. *See Hess Oil Virgin Islands Corporation v. UOP, Inc.*, 861 F.2d 1197, 1202 (10th Cir. 1988); *Berwind Corporation v. Litton Industries, Inc.*, 532 F.2d 1, 6 (7th Cir. 1976).

Blawas offered to let the FORD tie up at Terminal Pier No. 1 in South Slip No. 1 and Captain Gallagher accepted the offer without making any inquiry about the safety of the berth. The next morning Captain Gallagher received another change in orders. This time Cement Division ordered Captain Gallagher to leave the FORD where it was;[28] discharge the crew for the holiday; then return after Christmas to make one more delivery before mooring the FORD at the company's Milwaukee terminal for the winter.

Captain Gallagher made no effort to inform the City of this change in orders until later that day when Blawas, merely by chance, happened to be aboard the FORD on other business. After Captain Gallagher invited Blawas and several others to his office, he mentioned that the FORD would remain tied up for the next five or six days. He also mentioned that part of the crew would be leaving for the holiday. Blawas did not object. He agreed to let the FORD remain in South Slip No. 1,[29] but at the same

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[28] At the time Cement Division's Fleet Enginer [sic] Norman Martinson issued these orders, he was under the impression that Captain Gallagher had tied up at Terminal No. 4 in Slip No. 2 as previously arranged. *See* Transcript at 456 (Testimony of Patrick Gallagher), 315 & 299 (Testimony of Norman Martinson).

[29] Under this scenario the City did not "invite" the E.M. FORD to South Slip No. 1, as Cement Division contends. The City offered the slip to Captain Gallagher for a brief tie-up

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time he suggested that the Captain move the ship to the City's heavy lift dock in the inner harbor. Captain Gallagher rejected this proposal because his crew had already started to double the lines on the FORD and moving the ship would have cost the crew time and the company money.

In the course of their conversation Blawas warned Captain Gallagher that the weather could get "heavy" in the outer harbor if a storm arose. At the same time, Blawas undercut the warning by predicting that the waves in South Slip No. 1 would not exceed one-to-two feet. The record reveals that Captain Gallagher was unreceptive to the "heavy" weather warning. Without questioning Blawas further, he decided to let the FORD remain tied up in South Slip No. 1.

Whether Blawas actually delivered this warning was a hotly contested issue at trial. Captain Gallagher and his First Mate, Robert Brissette, did not remember any such warning, but Blawas' contrary version was corroborated by Walter Heckl, the manager of Advance Boiler & Tank Company, who was present during the Blawas-Gallagher meeting and who appeared to have no direct stake in the controversy.

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with a full crew aboard. By the time Captain Gallagher informed Blawas that the ship would hold over, the circumstances were materially different. The tie-up was to last for almost a week and – unbeknownest [sic] to the City – the entire crew was being discharged and the captain was going on vacation.

Even though the City partially discharged any obligation it had to warn, this court has found that the warning was inadequate under the circumstances. Clearly the warning was ineffective. Captain Gallagher chose to rely on Blawas' opinion (Cement Division calls it a "misrepresentation") that the waves would not exceed two feet. Accordingly, the FORD's master decided not to move the ship, not to accept the alternate berth, and not to leave a deck crew aboard. Instead, he merely left enough slack in the lines to accommodate two-foot waves, then he and the crew left for vacation.

Besides claiming that it should have been warned, Cement Division takes the position that, even though there was no sign of an impending gale on the morning of December 22, the City should have had the foresight either to refuse South Slip No. 1 to the E.M. FORD or to allow the ship to remain there only on the condition that it be manned by crew members who could pilot the ship to safety in case of an emergency.[30] The City had the power to issue such orders because, under the 1977 Public Port Tariff in effect at that time, it reserved the right to make berth assignments and to order vessels off berth in case of an emergency. *See* Exhibit 150 at Items 6, 10, 11 & 25. This right to order vessels off berth had rarely been exercised and could only be done on the express orders of Port Director Roy Hoffman. *See* Transcript at 1186-87 (Testimony of Stanley Blawas), 1124-27 (Testimony of Roy Hoffman), 906-11 (Testimony of Wright Garvey).

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[30] Although Cement Division makes much of the deficiencies of Milwaukee's outer harbor berths and suggests that the FORD could have been removed to safety, the plaintiff's position is undermined by the difficulties which beset another ship, the ITS PRESQUE ISLE, which was moored in Milwaukee's inner harbor on Christmas Eve. The Coast Guard Marine Safety Office, which investigated the sinking of the FORD concluded that:

> There is no evidence to indicate the S.S. E.M. FORD was improperly moored. This conclusion is based on the fact that the 1000 foot ITS PRESQUE ISLE broke loose during the same heavy weather while totally protected in the Inner Harbor Municipal Mooring basin and moored with anchor chain.

Exhibit 107 at 8, ¶7. *See also* Transcript at 869-74 (Testimony of Wright Garvey).

The record reveals that the only opportunity the City had to exercise its power to order the FORD off berth or retain a pilot aboard was during Captain Gallagher's chance encounter with Blawas on December 22. During the December 22 meeting Captain Gallagher failed to disclose to Blawas that the entire crew was being discharged and that the ship would be left for almost a week with no phone or radio contact, no way of monitoring the weather, and without a licensed pilot aboard. Blawas, on the other hand, failed to solicit adequate information so that he could decide whether any orders were warranted.

Once the December 22 meeting concluded and Captain Gallagher left the FORD, the opportunity for the City to warn or take preventive measures passed. There was no evidence that Cement Division had an basis for expecting that the City would provide a weather watch, security services or rescue operations after that time.[31]

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[31] The Port of Milwaukee operated a tug boat, but it was mainly used for patrolling the harbor and for picking up debris. *See* Transcript at 836 (Testimony of Wright Garvey). Wright Garvey, who was the Deputy Harbor Master in 1979,

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It is against this version of the facts – not the version alleged by Cement Division – that the City's duty of care and any breach of that duty must be assessed.

(b) Legal Basis

Cement Division's theory of liability is novel. The plaintiff has been unable to cite,[32] and the court has been

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had a pilot's license, but it was limited to vessels of 100 tons or less, *see* Transcript at 1123 (Testimony of Roy Hoffman), and the E.M. FORD weighed 4538 gross tons. *See* Exhibit 107. Independent tugs would not attempt to tow a ship without a pilot aboard. *See* Transcript at 1213 (Testimony of Stanley Blawas).

[32] In its posttrial brief Cement Division cites six cases in support of its theory that the City had a duty to warn or refuse to let the E.M. FORD lay up in South Slip No. 1. For reasons to be discussed above, none of these cases are apposite because, unlike the facts in this situation, these cases involve a wharfinger's duty to warn of manmade obstuctions [sic] or natural deficiencies or a bailee's duty to protect a vessel in its custody and control. *See THE JOHN CARROLL,* 275 F. 302 (2d Cir. 1921) (bailee liable for moving scow to place where it became unsafe for scow to remain when strong wind developed); *Hess, Inc. v. THE ARIZONA,* 242 F.2d 706 (2d Cir. 1957) (wharfinger liable when it distributed chart failing to disclose low water level); *Slater Fireproof Storage Company v. Nicholson Transit Company,* 47 F.2d 734 (7th Cir. 1931) (wharfinger liable for failure to remove or warn of man-made hazard); *Hirsch Lumber Company v. C. Ottaviano & Company, Inc.,* 18 F.2d 952 (2d Cir. 1927) (wharfinger liable for failure to warn of uneven bottom of berth); *Bouchard Transport Company v. Tug Gillen Brothers,* 389 F. Supp. 77 (S.D.N.Y. 1975) (wharfinger liable for failure to warn of low water level); *Central Barge Company v. City of Minneapolis,* 123 F.Supp. 275 (D. Minn. 1954) (bailee liable for failure to safeguard barge in its custody when tremendous amount of ice converged on barge).

unable to find, any case in which a duty to warn or a duty to refuse a berth to a ship were imposed on a wharfinger under similar circumstances.

The general rule is that a wharfinger is not the guarantor of the safety of a ship coming to its wharf. However, when the wharfinger invites a party to use its dock facilities, it is under a duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or to warn the ship of any hidden hazard or deficiency known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to it and is not reasonably known to the shipowner. *See Smith v. Burnett*, 173 U.S. 430, 433 (1898); *United States v. Mowbray's Floating Equipment Exchange, Inc.*, 601 F.2d 645, 646 (2d Cir. 1979); *Schwerman Trucking Company v. Gartland Steamship Company*, 496 F.2d 466, 477 (7th Cir. 1974). A wharfinger also owes a duty to furnish a safe means of egress and ingress to berthing ships. *See Sims v. Chesapeake and Ohio Railway Company*, 520 F.2d 556, 561 (6th Cir. 1975).

The reported cases in which a wharfinger was found to have breached this general standard of care fall into two broad categories. In the first category are cases in which the wharfinger's mooring devices or the dock itself failed. *See, e.g., Schwerman Trucking Company v. Gartland Steamship Company*, 496 F.2d 466 (7th Cir. 1974) (wharfinger found liable for defective and deteriorated condition of dock which crumbled during storm); *Medomsley Steam Shipping Company v. Elizabeth River Terminals, Inc.*, 354 F.2d 476 (4th Cir. 1966) (wharfinger liable for not exercising reasonable care to provide a safe berth where dock's cleat failed during severe storm).

In the second category are cases in which a ship is injured by a "hidden defect" – a man-made obstruction or a natural condition which is not open and obvious or known to those in control of the ship. *See, e.g., Grace Lines, Inc. v. Todd Shipyards Corporation,* 500 F.2d 361 (9th Cir. 1974) (dry dock operator liable to shipowner for failing to remove or give notice of underwater recessed dock wall which ripped hole in vessel as it approached the port); *Hess, Inc. v. THE ARIZONA,* 242 F.2d 706 (2d Cir. 1957) (pier owner liable for collision caused by distribution of misleading charts which failed to disclose shallow water near pier and this led to the grounding of the tanker on a shoal and her resulting swing into the pier); *Slater Fireproof Storage Company v. Nicholson Transit Company,* 47 F.2d 734 (7th Cir. 1931) (wharfinger liable for failure to inspect and remove tie rods or bolts protruding from pier several feet below the water which caused holes to be made in steamer's side and let in water which caused steamer to sink); *Hirsch Lumber Company v. C. Ottaviano & Company, Inc.,* 18 F.2d 952 (2d Cir. 1927) (wharfinger liable because it provided berth and invited lighter there when reasonable care and caution dictated otherwise; it should have warned the captain of the lighter of the dangerous soft and irregular bottom because of the likelihood that boat would ground at low tide and cargo would capsize); *Bouchard Transportation Company, Inc. v. Tug Gillen Brothers,* 389 F. Supp. 77 (S.D.N.Y. 1975) (wharfinger negligent in failing to maintain the southern approach to its ship dock in a safe condition for approaching vessels and in failing to provide any warning of the limited depth of water off its ballast dock to such approaching vessels).

Courts have imposed no duty upon a wharfinger to warn of weather conditions occurring during the docking maneuver or to warn of natural conditions or obstructions in the vicinity of the berth. *See, e.g., Bunge Corporation v. M/V FURNESS BRIDGE,* 558 F.2d 790 (5th Cir. 1977), *cert. denied,* 435 U.S. 924 (1978) (wharfinger not liable for failure to warn supertanker of size of dock, or of need for additional tug, or of river fog, or of presence of unfendered dolphin known to ship's master); *Trade Banner Line, Inc. v. Carribean Steamship Company, S.A.,* 521 F.2d 229 (5th Cir. 1975) (wharfinger not liable for parting of lines provided by vessel, for failing to warn of shallow water to west of berth, or for not providing fittings which would withstand a hurricane); *Bangor & Arrostook Railroad Company v. THE SHIP FERNVIEW,* 455 F. Supp. 1043 (D. Me. 1978) (wharfinger under no duty to advise an approaching vessel of weather reports at the pier or of other conditions arising during the ordinary course of navigation or docking and which are readily apparent to the ship; no duty to warn ship of fog, winds or similar meteorological phenomena).

The plaintiff is no longer claiming that the City breached any duty to provide a safe dock or mooring system. Instead, Cement Division is attempting to show that the propensity for dangerous surge conditions to develop in South Slip No. 1 was a "hidden defect" of which it had no actual or constructive knowledge.

The possibility of surge in South Slip No. 1 does not fit easily into the "hidden defect" line of cases. A surge is not a man-made obstruction nor is it an ongoing condition of nature like an uneven river bottom or shallow water. It is a transitory occurrence which the wharfinger cannot remove, fix or chart. In other cases in which a wharfinger has been found liable for failing to warn of a hidden hazard, the wharfinger had a degree of control over the hazard. In this case the City had no control over the wind and waves.

It is questionable whether the possibility of surge in a certain slip can be called "hidden" in the same sense that a sunken wreck or the uneven bottom of a slip is "hidden." The only reason the developing gale and resulting surge conditions remained "hidden" was that Captain Gallagher left the ship before the weather pattern fully developed and left no one aboard who could monitor the wind and waves. By definition, an emergency is unexpected. But even so, it is common knowledge that weather changes, especially in the winter months in northern ports. And, as the City pointed out, the configuration of the harbor, its breakwater, and the location of the slip at a direct angle from a gap in the breakwater were all open and obvious conditions which should have alerted an experienced captain to the possibility that high waves and turbulent conditions could develop.

Although the court cannot accept the proposition that the possibility of surge due to the "unique characteristics" of South Slip No. 1 is tantamount to a "hidden defect" as that term is usually used in maritime law, it is undisputed that the City had actual knowledge of the possibility. In arguing that the City had a duty to warn under these circumstances, it appears that Cement Division is trying to impose the more extensive duties of a bailee on the City-wharfinger.

Bailees of vessels have been held to have duties to warn of possible hazards, to inspect, and to protect the bailed property. *See, e.g., United Barge Company v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599 (8th Cir. 1978) (fleeting operator-bailee held liable for sinking of barge in its custody when bailee failed to conduct meaningful inspection); *Latin American Property and Casualty Insurance Company v. Hi-Lift Marina, Inc.*, 677 F. Supp. 1156 (S.D. Fla. 1988) (marina-bailee not held liable for intense fire of unknown origin which destroyed stored boats, but court held that bailee has duty to provide adequate security for bailed property by installing fire alarm system or having on-premises security at all hours); *Federal Barge Lines, Inc. v. Granite City Steel, Division of National Steel Corporation*, 608 F. Supp. 142, 148 (E.D. Mo. 1985) ("a bailment obligates the bailee to exercise ordinary care to protect the subject of the bailment"); *Compania de Navigacion Porto Ronco, S.A. v. S/S AMERICAN ORIOLE*, 474 F.Supp. 22 (E.D. La. 1976) (wharfinger-bailee held liable for damages sustained when vessel broke away from its berth and drifted into other vessels downstream; wharfinger, as a bailee entrusted with sole and exclusive custody and control of unmanned, dead vessel one month prior to breakaway was under a duty to exercise reasonable diligence in ascertaining condition of vessel's berth, to moor the vessel properly and securely in the face of impending bad weather, and to maintain the dock properly), *aff'd*, 585 F.2d 1326 (5th Cir. 1978); *Central Barge Company v. City of Minneapolis*, 123 F. Supp. 275 (D.

Minn. 1954) (City of Minneapolis as wharfinger-bailee held liable for breakaway of barge when tremendous and unprecedented amount of ice converged upon the barge; when City's control over barge was unconditional, it was held to be negligent in failing to take affirmative steps to safeguard barge by, among other things, failing to secure barge properly when conditions changed drastically two-and-one-half days after docking).

At trial Cement Division elicited testimony that the Port of Milwaukee conducts operations which would normally be expected of a bailee. It maintains a weather watch during regular working hours and employs round-the-clock security guards to patrol the port. However, the evidence also established that these operations are conducted primarily for the port's own benefit and are not offered to ships coming to its harbor under terms of the port's tariff. *See* Transcript at 1128, 1084-86 (Testimony of Roy Hoffman); Exhibits 150 & 178. Moreover, there was no testimony from Cement Division personnel that they intended to rely on these services when they accepted the berth for the E.M. FORD.

Clearly, there was no bailment in the instant situation. Cement Division remained in total custody and control of the E.M. FORD at all times. Generally, if the owner retains control of its vessel, it remains liable for damages arising out of its operation. *See Graham v. Milky Way Barges, Inc.*, 500 F. Supp. 721, 727 (E.D. La. 1984). Therefore, the City had no duty to inspect or watch the E.M. FORD.

If a duty to warn is to be imposed on the City of Milwaukee, it must be predicated on its role as a wharfinger. The Seventh Circuit has recommended that a useful framework for determining whether a party owes a duty of care in a maritime negligence case is the "Hand formula," named for Judge Learned Hand who first articulated the formula in *United States v. Carroll Towing Company,* 159 F.2d 169, 173 (2d Cir. 1947). *See United States Fidelity & Guarantee Company v. Jadranska Slobodna Plovidba,* 683 F.2d 1022, 1025-26 (7th Cir. 1982). The question in *Carroll Towing* was whether the owner of a barge owed a duty to keep an attendant on board while the barge was moored in the harbor, because barges sometimes break loose from their moorings and damaged [sic] other ships. Judge Hand defined the owner's duty as a function of three variables:

"P" = probability that the barge will break away;

"L" = gravity of resulting injury if it does break away; and

"B" = burden of precautions adequate to prevent it from breaking away.

The owner would be negligent if the burden of precautions (B) was less than the probability of harm, multiplied or discounted by the gravity of the injury (PL).

In the instant situation the magnitude of the loss ("L") is alleged to be six-and-three-quarter million dollars ($6,500,000.00 for the loss of the vessel and its cargo and $250,000.00 for the damage to the dock). The probability of such a loss occurring ("P") was low. The only remotely similar incident occurred on September 28, 1963, in the outer harbor when the M/V SUNBEAR was working cargo at the easterly berth at Terminal No. 1. The wind and seas built up to dangerous proportions, preventing efforts by tugs to move the ship to safety. Finally, the captain was able to disengage the ship from the berth and depart for Chicago. There was extensive damage to the dock and an estimated $40,000.00 damage to the ship. *See* Exhibit 159. But, although Cement Division was unable to produce any record of an unmanned vessel sinking at South Slip No. 1 during a northeasterly gale, the company was able to show that the City had extensive notice of the propensity for high waves and surge to develop in the slip. *See, e.g.*, Transcript at 1100-1110 (Testimony of Roy Hoffman), 840-69 (Testimony of Wright Garvey); Exhibits 147 & 174.

The third factor – the burden of the precautions necessary for the City to avert the loss ("B") – would have been small. At trial Cement Division introduced a copy of the 1981 Public Port Tariff as evidence that it would have been feasible for the City to promulgate a rule prohibiting temporary berthing in the outer harbor without a deck crew. This Tariff provides that:

> All vessels berthed at the Outer Harbor Municipal Piers shall maintain sufficient qualified personnel on board at all times to move the vessel in case of an emergency, except for vessels in winter mooring anchored in the Port of Milwaukee Mooring Basin, or moored at the City Heavy Lift Dock.

Exhibit 151 at Item 9. *See also* Transcript at 1130-31 (Testimony of Roy Hoffman).

Even without a printed rule, it would have cost the City nothing for Blawas to have given Captain Gallagher an adequate verbal warning.[33] Had Blawas also ordered the E.M. FORD to leave the outer harbor, it might only have cost the City the amount of the dockage fee ($156.54) which it eventually collected from Cement Division.[34] *See* Statement of Uncontested Facts at ¶ 21.

Applying the Hand formula to this case in which the burden of prevention is vastly outweighed by the magnitude of loss – even when discounted by the low possibility that the disaster would occur – leads to the conclusion that the City had a duty to provide Cement Division with an adequate warning of the possible perils of South Slip No. 1 and that the City was negligent in failing to warn adequately or to take preventive measures.

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[33] Blawas apparently believed that he had a duty to give some warning. Therefore, he should have given a warning that adequately described the type and degree of danger possible. Moreover, he should not have undercut the warning by simultaneously offering misleading assurances about the expected wave levels. Under evolving principles of tort law, even one who has no duty to speak, but makes a disclosure nevertheless, undertakes to speak accurately. *See Estate of Callas v. United States*, 682 F.2d 613, 622 & n.12 (7th Cir. 1982) (once government undertook to perform safety function of warning public of boating risks, it became obligated to do so without negligence). *See also Central Rivers Towing, Inc. v. City of Beardstown*, 750 F.2d 565, 572 (7th Cir. 1985) (under the good Samaritan doctrine, once the Coast Guard voluntarily assumed the duty to mark a pier, it also undertook the obligation to use due care in doing so).

[34] It should be noted that considerably more cost can be incurred by a wharfinger who orders a master to move a vessel. For example, in *THE JOHN CARROLL*, 275 F. 302 (2d Cir. 1921), the wharfinger exercised his authority to order a scow to move to another location on the pier for the wharfinger's convenience. A storm arose and the scow was damaged by pounding against the pier. The court ruled that, in ordering the scow to move, the wharfinger was acting as a bailee and, therefore, had a duty to exercise reasonable care for the scow's protection by moving her to a place of safety. Because the wharfinger had breached this duty, it was held liable for the injury to the ship.

This conclusion is buttressed by three other factors:[35] the City's actual knowledge that the surge phenomenon could occur; the City's power to control berthing at South

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[35] When situations such as this arise for which there is no clear legal precedent, courts have imposed duties based on an evaluation of which party was in a position to prevent the accident had reasonable care been exercised. The relevant factors include the customs and practices of the maritime industry; the expectations of the parties as expressed in contracts or other agreements; and, most important, the actual control each party has over the instrumentalities of the disaster and the property subject to injury. For example, in *Texas Eastern Transmission Corporation v. McMoRan Offshore Exploration Company,* 863 F.2d 355 (5th Cir. 1989), a maritime negligence case, the court found three parties at fault for failing to warn based on each party's degree of control over the operations, each party's actual knowledge of the operations, and the agreements between the parties. In *Texas Eastern* a violent New Years Eve storm disrupted the process of relocating a drilling rig at a specific location in the Gulf of Mexico. An underwater pipeline ruptured when the rig attempted to retrieve one of its anchors. The trial court found a tug boat operator liable for giving false assurances that its tugs could hold the rig; the offshore exploration company was held liable for ordering operations to continue without warning of the location of the pipeline; and, the owner of a survey boat was held liable for remaining silent when it observed the rig drifting. In addition, the owner of the rig was held contributorily liable for failing to ascertain whether one of its anchors was hooked on the pipeline. *See Id.* at 361.

Slip No. 1; and, the City's interest in protecting its own property.

First, the record amply demonstrates that the City had superior knowledge that a dangerous condition could develop in the slip through its own observations and records of daily wave heights dating back to 1958. *See* Transcript at 840-69 (Testimony of Wright Garvey); Exhibit 174. *See also* Exhibit 147 ("A Model Study of Methods of Correcting Objectional Wave Conditions in the Vicinity of Pier No. 1 Milwaukee Harbor, Wisconsin"). Port Director Roy Hoffman readily admitted that the outer harbor slips were not suitable for winter moorings (i.e., a dead ship without a crew) because of the turbulent conditions that could arise. *See* Transcript at 1051-52 (Testimony of Roy Hoffman). *See also* Transcript at 932-33 (Testimony of Wright Garvey). At the same time, the City had no reason to believe that Cement Division had actual knowledge of the possibility of this specific phenomenon. Therefore, the law demands that adequate notice be given. *See Grace Lines, Inc. v. Todd Shipyards Corporation*, 500 F.2d 361, 365 (9th Cir. 1974) (regardless of whether a captain should have been aware of a hidden danger, a wharfinger has a duty to give notice unless the captain is actually aware of it).

Second, the City has the power under the 1977 Public Port Tariff to assign berths and order vessels off berth. *See* Exhibit 150. Therefore, the City had the power and means to control the events which led to the disaster. Although the City's agents testified that this power was seldom exercised, a customary practice does not exonerate a wharfinger from the duty to exercise care in proportion to the danger to be avoided. *See Complaint of Paducah Towing*

Company, Inc., 692 F.2d 412, 426 (6th Cir. 1982); *United States Fidelity & Guaranty Company v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1028 (7th Cir. 1982).

Finally, unless the City warned or ordered the E.M. FORD to keep a crew aboard or leave the dock, it was putting its own property at risk of being severely injured by a breakaway vessel. Therefore, its duty of care extended not only to the vessels which came to its wharf, but also to its own dock.

Taking these factors into consideration in view of the facts established at trial and the applicable law, the court concludes that, by providing an inadequate and misleading warning to Cement Division about the possibility of dangerous surge in South Slip No. 1, the City breached its duty of care for the E.M. FORD and for its own dock property. *See generally Texas Eastern Transmission Corporation v. McMoRan Offshore Exploration Company*, 863 F.2d 355 (5th Cir. 1989). The City was also at fault for allowing the FORD to remain in South Slip No. 1 without ascertaining whether there would be a pilot and sufficient crew aboard.

2. Lack of Fault of the Edward E. Gillen Company

Plaintiff Cement Division did not initiate any claims against the Edward E. Gillen Company. Gillen was brought into this case as a third-party defendant by the City of Milwaukee on a theory that Gillen was directly liable to Cement Division for all or part of the damage to the S.S. E.M. FORD. After the third-party complaint was filed, this action proceeded as if Cement Division had commenced it against Gillen as well as the City of Milwaukee. *See* Federal Rule of Civil Procedure 14(c). The City has made no claim against Gillen for any of the damage to the dock.

The crucial liability issue with respect to Gillen is whether the marine contractor breached any duty of due care it owed to Cement Division. After Gillen settled with Cement Division on the third day of trial, the remaining parties presented very little evidence tending to establish fault on the part of this third-party defendant. In effect they ignored this claim.

After the court expressed the hope that it would hear testimony from Gillen foreman Salvatore Gumina, the City reluctantly called him to the stand. Gillen employees Stanley Catarozoli and Keith Iverson also testified during the defendant's case-in-chief. Only three Gillen fact witnesses were called to testify.

Generally, "an owner is entitled to rely on the representation of a marine contractor that it is qualified to execute the task for which it is engaged." *Roach v. M/V AQUA GRACE*, 857 F.2d 1575, 1583 (11th Cir. 1988). But, in this case the trial testimony failed to delineate clearly the tasks for which Gillen was engaged by Cement Division. Any duties Gillen had to exercise care for the property of Cement Division stemmed from a loose, verbal agreement between Captain Gallagher and Gumina. Gumina related that on December 22, 1979, he was asked to come aboard the E.M. FORD by the first mate. *See* Transcript at 2005 & 1972 (Testimony of Salvatore Gumina). There, he remembered meeting and speaking with

Captain Gallagher for the first time;[36] but he did not testify that he contracted to provide any services to the E.M. FORD during the Christmas holiday.

Captain Gallagher, on the other hand, gave the following account of his conversation with Gumina:

> Q Did you have any other conversation with Mr. Gumina?
>
> A Yes, I had the agreement that Mr. Gumina would check on the ship and if anything were needed he would furnish it. And I explained that the mate, the mate was present during much of this conversation, the first mate, and I told the mate, "Go down and show him where the fenders are, bumpers in case them are needed and he can put them over". And he explained that he would have, he would check on the ship every day and if anything was needed he would have a crew ready, you know.
>
> Q You said you had an agreement. What was your understanding of the agreement?
>
> A That he had been hired, the company had been hired to–
>
> Q To do what?
>
> A To check on the ship, and if anything were needed to furnish it or put in, furnish help if any help were needed.
>
> Q Check on what on the ship?

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[36] Captain Gallagher admitted that he had had no prior dealings with Gumina. *See* Transcript at 468 (Testimony of Patrick Gallagher).

> A Oh, such things as whether any line had chafed or if we had to replace a line or something to that effect. And as I say, if any tires had to be put over, if fenders had to be put over he would do that.

Transcript at 467-68 (Testimony of Patrick Gallagher).

First Mate Robert Brissette, who was present during the captain's conversations with Gumina, could not corroborate the captain's recall of the details of this agreement. Brissette only remembered that Gumina promised that "we [Gillen] can take care of the ship for you." *See* Transcript at 94 (Testimony of Robert Brissette). Brissette also recalled that Gumina agreed to provide an anchor chain and extra lines on Monday (December 24), if needed. *See Id.* at 142, 101 & 94.

After the close of testimony the contours of the Gumina-Gallagher agreement remain unclear. The court cannot find that there was any meeting of the minds on most of the terms outlined by Captain Gallagher. The court believes that, at most, Gumina agreed to check the FORD's moorings and provide lines, fenders and an anchor chain, if necessary. A preponderance of the evidence does not show that Gumina agreed to check the FORD at any specified intervals or to provide a stand-by crew or any other time or labor intensive services during the holiday weekend. Furthermore, no evidence was presented showing that Gumina had the real or apparent authority to bind Gillen to any agreement with Cement Division.

Despite Captain Gallagher's understanding, Gumina did not check the FORD's moorings on a daily basis, but only happened to be driving by on December 24, when he saw that the ship was away from the dock. *See* Transcript at 2027-28 (Testimony of Salvatore Gumina). Gumina's discovery of the FORD's plight came within an hour of the time the crew members left aboard the FORD had themselves discovered that the moorings were in jeopardy. Thus, even though Gumina did little to fulfill any agreement he might have made to watch the ship's moorings, any negligence in this regard did not cause the harm to the FORD because there is no evidence that there was any problem with the moorings before the early afternoon of December 24.

During the next two hours Gumina went to the Gillen office and managed to raise a five-man crew and obtain additional lines. *See Id.* at 1992. This crew then returned to the FORD and, under the direction of Captain Thomas Parks (who had been asked by Cement Division to assist with the rescue effort), attempted to secure the vessel's moorings. This effort was ultimately unsuccessful.

In its posttrial brief (written after Cement Division had reached a settlement with Gillen), the plaintiff argues that any fault attributable to Gillen should be minimal because any additional lines and men Gillen could have provided would not have prevented the disaster. *See* Plaintiffs' Post-Trial Brief at 26-28. Cement Division explains that:

> The Gillen contract is blown out of proportion. Gillen's liability, if any, comes into play because of what it did or did not do once it started to act sometime between 12:30 P.M. and 1:00 P.M. on December 24, 1979, not because of any failure to check lines. . . . Gillen was hired to check the lines and to be on call in case a line might need replacement, if necessary. Gillen was

> not hired for a breakaway situation, because a breakaway situation was not foreseeable at the time and place in question in the light of the City's misleading actions, through Mr. Blawas, with regard to lay-up berths at Terminal No. 4 and Terminal No. 1.

Plaintiffs' Post-Trial Reply Brief at 12-13.

Cement Division purports to be aggrieved by the fact that on December 24, 1979, Gillen employee Salvatore Gumina placed three calls to independent surveyor William Wade in Cleveland beginning at 1:46 P.M., *see* Exhibit 201, but that he did not call any Cement Division personnel.[37]

The court has not imposed any liability on this failure to notify theory because it is not supported by the evidence. Cement Division offered no testimony that anyone in authority was on duty at its Michigan headquarters on the afternoon of December 24. To the contrary, all the participants who testified at trial admitted that they were already on vacation at that time. It is undisputed that Captain Gallagher did not furnish Gumina with the home telephone numbers of himself or any other Cement Division personnel. *See* Transcript at 1977 (Testimony of Salvatore Gumina). And, most important, there was no evidence that Gillen's three-to-four hour delay in notifying Cement Division exacerbated the plight of the E.M. FORD or that swifter notification could have averted the disaster. No Cement Division witness suggested anything that realistically could have been done from Michigan[38] had Cement Division been notified earlier. *See, e.g.*, Transcript at 666-70 (Testimony of Patrick Gallagher).[39] Therefore, the court does not attribute any negligence to Gillen on this theory.

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[37] It was Wade who called Cement Division's Fleet Engineer Norman Martinson at his home in Alpena, Michigan, at 4:03 P.M. About that same time Stanley Blawas called First Assistant Engineer Joseph Zolnierek and Captain Gallagher to notify them of the emergency.

Even though the plaintiff made little serious effort to establish fault on the part of Gillen, a third-party defendant can still be found at fault based upon evidence introduced by the original defendant. *See Ohio River Company v. Continental Grain Company,* 352 F. Supp. 505, 511-13 (N.D. Ill. 1972). The City continues to argue that Gillen must bear a proportionate share of the fault (along with Cement Division), but it has presented little proof in support of this position. The City devotes only one paragraph of its thirty-five page closing brief to arguing that Gillen was negligent. The City says that:

> The master failed to replace key members of the crew whom he had permitted to go home.

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[38] Alpena, Michigan, the home of Captain Gallagher and Fleet Engineer Martinson, is on the northeastern border of Michigan on the shore of Lake Huron.

[39] Captain Gallagher testified that, had he been notified earlier, he would have called Fleet Engineer Norman Martinson for orders to move the ship; that he would have called the Gilien Company; and that he would have called a towing company. *See* Transcript at 668 (Testimony of Patrick Gallagher). It is unlikely that this suggested course of action could have saved the FORD. Both Captain Gallagher and Fleet Engineer Martinson were in Alpena, Michigan on December 24. The Gillen Company was already aware of the FORD's plight. And, without a licensed pilot aboard, a towing company could not have moved the ship.

> Instead, he hired a shorebased crew by entering into an agreement with the Gillen Company, a marine contractor the Cement Division had previously hired to do maintenance work on its ships. Ted Gumina, a Gillen Company piledriving foreman with no navigation experience, entered into an agreement on behalf of the Gillen Company with Gallagher. Gumina was to watch the weather and in the event of inclement weather was to assist the vessel. Gumina agreed to provide personnel, lines and an anchor chain and to place the lines and chains as required. The master made this arrangement without knowing whether the Gillen Company had the personnel, equipment and knowledge to perform the work contracted for. Rather, the master relied upon the fact that Ted Gumina, whom he had never met before, appeared to know what he was talking about. The consequence of his failure was that the Gillen Company was unable to provide any personnel, lines or anchor chains when the ship was in peril. The Gillen Company was not able to provide any effective assistance until many hours had passed and Captain Parks arrived to direct the Gillen employes [sic].

Brief of Defendant and Third-Party Plaintiff City of Milwaukee at 31-32. Instead of establishing causal fault on Gillen's part, the City's argument tends to fault Captain Gallagher for hiring a shore contractor without knowing what services it was equipped and staffed to handle and then for failing to provide definite instructions for the contractor.

The City called two expert witnesses at trial. Both were Great Lakes masters who agreed that, as long as the master remains in control, he cannot rely on shore contractors to ensure the safety of his ship. *See* Transcript at 1835, 1827 (Testimony of Thomas Doyle), 1515 (Testimony of Louis Carter). While there was some opinion testimony that Gumina took too long to obtain lines and summon a crew, *see* Exhibit 210 (Deposition of John T. Burke at 3-19, 20-92, 95-116),[40] the more persuasive testimony indicated that any measures taken by Gillen could only have delayed the ensuing damage to the FORD. *See generally* Transcript at 1822-70 (Testimony of Thomas Doyle), 1500-1711 (Testimony of Louis Carter). *See also* Transcript at 151 (Testimony of Robert Brissette). Likewise, there was no evidence presented showing that the damage to the FORD would have been less extensive had Gillen acted with more dispatch.

Because of the paucity of evidence presented, the court is not convinced that a totally accurate picture of Gillen's role emerged at trial. However, based on what evidence was presented, the court cannot conclude that any act or omission by Gillen was a proximate case [sic] of the injury to the E.M. FORD. Consequently, no causal fault has been attributed to Gillen.

3. Fault of Cement Division, National Gypsum Company

The City of Milwaukee answered the plaintiffs' complaint by denying all liability and asserting a counterclaim alleging that Cement Division's negligence was the sole cause of the damage to the City's dock and surrounding property as well as to the E.M. FORD. In its posttrial brief the defendant sums up its position that: "The vessel was lost because its master and owners left it in an exposed outer harbor slip without an adequate crew." Brief of Defendant and Third-Party Plaintiff City of Milwaukee at 33. Specifically, the City charges that the plaintiff was at fault for:

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[40] Captain Burke was not called to testify at trial. His deposition, which had been taken adversely by Gillen, was offered as an exhibit by Cement Division. *See* Exhibit 210.

- –failing to have a master on call
- –failing to leave any crew members aboard capable of moving the ship
- –failing to monitor the weather
- –failing to provide the volunteers left aboard the ship with any means of ship-to-shore communication
- –failing to instruct the volunteers who remained aboard about what to do in case of emergency
- –failing to moor the E.M. FORD with her stern inward
- –hiring an ill-equipped shore contractor to watch the lines

See Id. at 30-34.

While the plaintiffs' theory of liability is novel, the defendant's is supported by well-established precedents. The duties of the shipowner and shipmaster are extensive. While the owner remains in custody and control of the vessel and while the master remains in command, they are responsible for all matters concerning the safety of the ship and its crew and must take care to minimize any chance of harm to others. *See Boudoin v. J. Ray McDermott & Company,* 281 F.2d 81, 85 (5th Cir. 1960). At trial, Captains Thomas Doyle and Louis Carter, who had both served as masters on the Great Lakes, testified that a master's duties are all-inclusive. They begin at the moment the master takes command and do not end until he is relieved of command. *See* Transcript at 1835 & 1827 (Testimony of Thomas Doyle), 1517 (Testimony of Louis Carter). *See also* Transcript at 1125 (Testimony of Roy Hoffman); Exhibit 210 (Deposition of John Burke at 84-85).

Cement Division's failure to man the E.M. FORD with a captain or licensed pilot and sufficient crew during the temporary layup was the leading cause of the disaster. A shipowner has a nondelegable duty to provide a competent master and crew. *See Hercules Carrier, Inc. v. Claimant State of Florida,* 768 F.2d 1558, 1565-66 (11th Cir. 1985). A master is negligent when he leaves his vessel without sufficient manpower aboard to avoid damage to the vessel or another structure should an emergency arise. *See Trawler Jeanne D'Arc, Inc. v. Casco Trawlers, Inc.,* 260 F. Supp. 124, 136 (D. Me. 1966). Because there was no one aboard capable of piloting the ship, the E.M. FORD could not move by its own power or with the aid of tugs when the emergency arose on December 24. Captain Louis Carter estimated that it would have taken about an hour and a half to disengage the lines and depart the dock under regular conditions with a full crew or about three hours with a normal watch.[41] In an emergency, those on a ship manned with one watch could have chopped or burned the lines and departed in ten minutes. *See* Transcript at 1573-78 (Testimony of Louis Carter).

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[41] A full watch in the forward and after end includes a mate, wheelsman, watchman, deck watch, engineer, oiler and stockerman. *See* Transcript at 1585 (Testimony of Louis Carter).

Thus, the E.M. FORD could have easily sought a safe haven once the gale warnings went up at 7:00 A.M. on December 24 and could still have moved or been tugged out of the berth once her lines began to part later in the day. Without a captain and sufficient crew all other rescue efforts were doomed.

Even if he is not aboard, a master must keep himself continuously informed about all conditions affecting his ship. *See Petition of M/V ELAINE JONES,* 480 F.2d 11, 21 (5th Cir. 1973), *cert. denied sub nom. Canal Barge Company v. Griffith,* 423 U.S. 840 (1975); *Boudoin v. J. Ray McDermott & Company,* 281 F.2d at 85. This duty to keep informed includes the duty to monitor weather conditions. *See Id.* at 84-85. A master can also be negligent for failing to instruct the crew if the lack of instruction is proximately related to the allision. *See Hercules Carriers, Inc. v. Claimant State of Florida,* 768 F.2d 1558, 1573 (11th Cir. 1985). Captain Gallagher himself admitted that he made no effort to have anyone aboard ship monitor the weather after he departed. *See* Transcript at 630-31, 564-65 (Testimony of Patrick Gallagher). Shortly after the captain and crew departed, forecasts from the National Weather Bureau would have indicated to an experienced mariner that gale conditions could be developing on southern Lake Michigan. *See* Transcript at 592-602 (Testimony of Patrick Gallagher). The forecast developed into a near certainty by 7:00 A.M. on December 24 when the Coast Guard posted gale warnings for an area including the Port of Milwaukee. But the volunteers aboard the FORD had no means of receiving these reports. The Captain had locked the radio cabinet and left those aboard with no means of receiving communications from shore. *See* Transcript at 617-19 (Testimony of Patrick Gallagher).

The Captain's failure to provide anyone to monitor the weather and maintain ship-to-shore communications was a contributing cause of the disaster. The weather warnings would have given Cement Division ample time to seek a safe place for the FORD to wait out the gale. Instead, those aboard knew nothing of the impending danger until the ship had begun to move away from the dock.

In addition to failing to make any provision for a weather watch, the Captain failed to instruct the five volunteers about what measures to take in case of an emergency. He merely left them a note with the telephone number of Gillen foreman Salvatore Gumina. *See* Exhibit 132. *See also* Transcript at 682-83 (Testimony of Joseph Zolnierek). He expected the crew members to jump ashore to use a pay telephone near the dock to summon help.

Captain Gallagher's failure to instruct the five volunteers[42] about what measures to take should an emergency arise shows an attitude of indifference for the safety of his ship, but the City was unable to show how the captain's failure to instruct was causally related to the disaster. Given the fact that the volunteer crew consisted only of a third assistant engineer, an oiler, a wiper, a porter and an acting steward, it is unclear what measures they were capable of taking.[43]

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[42] It is significant to note that none of the five volunteers testified at trial, although portions of the deposition testimony of Third Assistant Engineer James Sheridan and oiler Robert Malaski were introduced as evidence. It is a general maritime rule that the failure to produce an important witness in an admiralty action may raise the inference that the testimony would have been unfavorable to the party by whom the witness should have been called. *See Amerada Hess Corporation v. M/T MARIAM*, 533 F. Supp. 158, 166 (S.D. Ala. 1982).

The evidence at trial also failed to establish that Captain Gallagher was at fault for mooring the E.M. FORD improperly. There was some testimony that the mooring would have been more secure had the captain used an anchor chain, but there was also countervailing testimony that the anchor chain would not have held the ship and might have caused additional damage to the dock. *See, e.g.*, Transcript at 1582-83 (Testimony of Louis Carter), 1035-36 (Testimony of Thomas Parks), 664, 477 (Testimony of Patrick Gallagher), 151 (Testimony of Robert Brissette). There was no lay or expert testimony that any mooring configuration could have held the ship at the dock for the duration of the violent surging.

The City argues that mooring the FORD with her bow facing out of the slip would have made it easier for the ship to leave the berth under her own power or with the assistance of tugs. But assuming that this theory has merit,[44] the direction in which the ship was facing was not a cause of this disaster because, without a pilot, the ship could not be moved no matter which way it was facing.

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[43] The City does not fault the five crew members for anything they did or did not do to aid the rescue effort. Witnesses observed one or two of the FORD crew joining in the effort to secure the ship, but others were seen preparing a turkey dinner while the winds raged. *See* Transcript at 1915 (Testimony of Keith Iverson), 1880 (Testimony of Stanley Catarozoli), 804-05 (Testimony of Andrew LaBorde).

Throughout the trial Captain Gallagher and the other Cement Division officials attempted to imply that the City should have assumed the responsibility for protecting the ship. They pointed out that the City maintains a weather watch and a security guard and that it employs a licensed pilot and owns a tug boat, but Cement Division was unable to prove that the City had agreed to provide any of these services to the E.M. FORD. The E.M. FORD was not bailed to the City; the owner remained in custody and control at all times. Therefore, it was negligent for the owner to rely on the wharfinger to protect or rescue the ship. In another case in which a ship was damaged after being cast adrift by a hurricane, the court ruled that: "When the captain of the TRADE CARRIER secured his radio shack and thereafter failed to keep track of the course and fury of the storm, he was negligent and he breached his duty to his ship. He was not entitled to rely solely on others to keep him posted as to the course and strength of the storm." *Trade & Transport, Inc. v. Caribbean Steamship Company,* 384 F. Supp. 782, 787 (S.D. Tex. 1974), *aff'd in part, rev'd in part on other grounds,* 521 F.2d 229 (5th Cir. 1975).

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[44] Captains Doyle and Carter were of the opinion that, if the E.M. FORD had been backed into the slip, she would have been easier to handle. *See* Transcript at 1861-62 (Testimony of John Doyle), 1567-68 (Testimony of Louis Carter).

Cement Division also attempts to exonerate itself by claiming that the City's breach of its duty to warn was the sole cause of the disaster. Although the court has concluded that, under the unusual facts of this case, the City did have some obligation to warn or refuse to let the E.M. FORD remain tied up at South Slip No. 1 without an adequate crew, this duty on the part of the City in no way relieves the master of his duty to obtain crucial information. As the Fifth Circuit has observed:

> A captain's duty to possess himself of essential knowledge exists independently of whether there is present another person who has a duty to inform the captain. Such a person might have a duty to inform the captain without being asked, but the captain still has a duty to ask. The duty of each does not negate the duty of the other or excuse the failure of each to carry out his duty.

Petition of M/V ELAINE JONES, 480 F.2d 11, 23 (5th Cir. 1973), *cert. denied sub nom. Canal Barge Company, Inc. v. Griffith,* 423 U.S. 840 (1975).

Cement Division had actual knowledge of the United States Salvage Association's prohibition against winter mooring in the outer harbor in Milwaukee and had been warned by independent marine surveyor William Wade before the FORD left Alpena that Milwaukee's outer harbor is subject to heavy surge. Moreover, as soon as Captain Gallagher apprised the City of the plan to leave the FORD tied up for a number of days so that part of the crew could go home for the holiday, Stanley Blawas warned him that the weather could get "heavy" in the outer harbor. Without acknowledging that he received this warning, Captain Gallagher testified at trial that:

> I might make my reply that I would have loved to have been given a reason that I could have went back again called our fleet engineer, I would have loved, I was looking for information, or to use the word "ammunition" that I could say to him, "Hey, we can't lay here, this dock is a dangerous dock, we got to get out of here, we should go up and go up to the Huron Cement dock and unload and leave," or "We should take it up there and lay the ship up". I would have been glad to get that information.

Transcript at 671-72 (Testimony of Patrick Gallagher). The court finds this testimony wholly incredible. Not one witness to the Blawas-Gallagher meeting testified that Captain Gallagher questioned Blawas about the "heavy" weather warning or sought additional information of any kind.

Besides trying to shift the blame to others, Cement Division attempts to show that it was merely following accepted customs and practices in the maritime industry by allowing Captain Gallagher to leave the ship with the radio locked up; by providing those left aboard with no means of ship-to shore communication; by failing to monitor the weather while in port; and by discharging the entire crew leaving only five volunteers (none of whom were part of the deck crew) aboard. However, a shipowner cannot relieve itself of responsibility by blindly adhering to customs and practices when circumstances warrant a departure from routine procedures. *See Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1156-57 (2d Cir. 1978) ("A party cannot by his own continued negligence establish a custom by which he is exempt from liability; nor is legal responsibility for negligence mitigated by the fact that others had also been negligent."), *cert. denied,* 440 U.S. 959 (1979); *United Barge Company v. Notre Dame Fleeting & Towing Service, Inc.,* 568 F.2d 599, 604 (8th Cir. 1978).

In this case it was foreseeable that leaving the ship tied up in the outer harbor without a captain, crew or communications entailed a risk, if not from surge, then from any number of other events. *See Complaint of Hercules Carriers, Inc.,* 566 F. Supp. 962, 978 (M.D. Fla. 1983), *aff'd sub nom. Hercules Carrier, Inc. v. Claimant State of Florida,* 768 F.2d 1558 (11th Cir. 1985) (it is sufficient that a danger from any number of probable causes is reasonably apparent); *Petition of Kinsman Transit Company,* 338 F.2d 708, 725-26 & n.11 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Company v. City of Buffalo,* 380 U.S. 944 (1965) (unforeseeability of the exact developments and of the extent of the loss will not preclude liability). Under these circumstnaces [sic] it was not reasonable to rely on customs and practices of the industry. Cement Division's unreasonable reliance constitutes fault because these practices were among the causes of the disaster. *See Complaint of Paducah Towing Company, Inc.,* 692 F.2d 412, 426 (6th Cir. 1982); *United States Fidelity & Guaranty Company v. Jadranska Slobadna Plovidba,* 683 F.2d 1022, 1028 (7th Cir. 1982).

The court has no doubt that, under the well-established law, Cement Division was at fault for leaving the E.M. FORD temporarily tied up at South Slip No. 1 without a captain, crew, any means of ship-to-shore communications or weather monitoring capability and that the captain abdicated his duties by failing to obtain sufficient information about the berth and the changing conditions in the harbor. Application of the Hand formula confirms this conclusion. As discussed above, the magnitude of the potential loss was great, while the probability of such a loss occurring was low. Yet, the burden of the precautions necessary to avert the disaster was also low. The company would have had to keep the ship operating, pay a sufficient number of the crew holiday pay, and retain a master – at least on stand-by. In the alternative, the company could have reverted to its original plan, ordered Captain Gallagher to wait for the S.T. CRAPO to unload, then moored the E.M. FORD at Cement Division's own dock well within the inner harbor. This course of action would also have involved paying holiday wages to the crew, but these costs pale in comparison to the multimillion dollar loss of the ship and its cargo.

4. Comparative Fault

In *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 411 (1975), the United States Supreme Court held that, in admiralty, when two or more parties have contributed by their fault to cause property damage in a maritime allision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. *See Id.* at 411. In admiralty law, contributory negligence operates as comparative negligence. *See S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166 (5th Cir. 1979), *cert. denied sub nom. St. Paul Mercury Insurance Company v. East West Towing, Inc.*, 446 U.S. 918 (1980). Contributory negligence does not bar a plaintiff's claim but only serves to lessen its recoverable damages in proportion to its fault as compared to that of the defendant. *See Id.* at 168.

Under this standard it is culpability, not the degree of physical causation, on which liability is apportioned. *See Harbor Tug & Barge, Inc. v. Belcher Towing Company,* 733 F.2d 823, 825 (11th Cir. 1984); *Cumberland County Utilities Authority v. M/T DELBAR,* 604 F. Supp. 383, 389 (D.N.J. 1985). Fault which produces liability must be a contributing or proximate cause of the allision. *See Id.* at 826.

Clearly, the plaintiffs must bear the greater share of fault for this disaster. From the time the E.M. FORD departed on its final voyage to Milwaukee until the time the captain and crew departed for the holiday, Captain Patrick Gallagher consistently chose the course of action which would save money for Cement Division and time for himself and the crew – even at the cost of risk to the ship.[45]

Upon arriving in Milwaukee with orders to wait for a sister ship to unload before mooring at the Cement Division dock, the captain put in at Terminal Pier No. 1 in South Slip No. 1 – the first available berth in the outer harbor. He rejected the City's offer of an inner harbor berth, in part, because it would have required two more hours of travel in the river. *See* Transcript at 208 (testimony of Eugene Stafford). In addition, the City was charging its cheaper winter mooring rate at South Slip No. 1, while it would have charged its regular rate for an inner harbor berth. *See* Transcript at 1191-93 (Testimony of Stanley Blawas).

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[45] Not all the acts or omissions mentioned throughout this section were legal causes of the disaster. They are merely illustrative of Cement Division's general pattern of conduct.

The next day, having received the unwelcome news that the FORD would have to make another delivery after Christmas, the Captain chose in [sic] remain in South Slip No. 1. Then, without notifying the City of this change in plans, he ordered the crew to double the lines without taking the time to turn the ship so that the bow was facing out of the slip. If the ship had been facing outward, it would have been easier for the ship to leave the berth in case of emergency. However, turning the ship would have involved the expense of using tugs. *See* Exhibit 210 (Deposition of John Burke at 45).

Captain Gallagher also decided not to lower the ship's anchors. Instead, he spent considerable time checking to find out if an anchor chain was required at the Port of Milwaukee. After being unable to verify that there was any requirement for a chain and learning that attaching an anchor chain during the weekend would entail paying overtime to a Gillen crew for at least half a day's work, Captain Gallagher decided to forego the anchor chain for the present and left it to Gillen's foreman Salvatore Gumina to decide whether to put out an anchor chain on the next regular work day. *See* Transcript at 2009-10 (Testimony of Salvatore Gumina), 682 (Testimony of Joseph Zolnierek), 570-78 (Testimony of Patrick Gallagher); Exhibit 210 (Deposition of John Burke at 49). There is no evidence that the Captain considered whether an anchor chain might be needed even though it was not required.

When Captain Gallagher finally informed Stanley Blawas that Cement Division wanted the FORD tied up at South Slip No. 1 until after Christmas, Blawas did not object, but suggested that the vessel move to the City's heavy left [sic] dock in the inner harbor. Captain

Gallagher rejected this proposal because the crew had already started to double the lines and all aboard were anxious to depart for their holiday destinations.

A short time later, in order to save Cement Division holiday pay,[46] the Captain discharged the entire crew, leaving only five "volunteers" aboard with a note bearing the telephone number of Salvatore Gumina. He left the five with no means of receiving weather service reports, no ship-to-shore communications, and, most critically, no pilot or deck officer who could remove the ship to safety. Captain Gallagher failed to retain a stand-by master, even though he himself planned to be vacationing in Alpena, Michigan on the shores of Lake Huron. Instead of taking any of these precautions, he entered into a loose arrangement with Salvatore Gumina to watch the lines.

The company attempts to justify all Captain Gallagher's time and money saving conduct as customary business practices. If these were Cement Division's usual business practices, the company's experience must have been that the cost savings justified the degree of risk. If Cement Division had experienced an unacceptable incidence of loss, it would undoubtedly have had to change these practices or be driven out of the marketplace.

On December 24, 1979, however, the risk became a reality. With no captain or deck crew aboard the E.M. FORD broke loose from her moorings, battered the dock, then sank with a full cargo aboard. Having reaped the cost saving benefits of its business practices, Cement Division must now assume the greater share of fault for the losses caused by these practices to its own property and to the property of the City of Milwaukee.

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[46] *See* Transcript at 517 & 458-59 (Testimony of Patrick Gallagher), 154 (Testimony of Robert Brissette); Exhibits 527 & 528.

The court has concluded that the acts and omissions of both Cement Division and the City of Milwaukee were contributory or proximate causes of the allision between the E.M. FORD and the dock at Terminal Pier No. 1 in South Slip No. 1. Theoretically, either party could have prevented the disaster by ensuring that the FORD was moved out of this berth. However, this situation it [sic] better viewed as a case of joint rather than alternative care. The fact that both parties possessed the duty to accomplish the same result does not relieve either party of liability. Each were concurrent and independent causes of the allision. *See Riverway Company v. Trumbull River Services, Inc.*, 674 F.2d 1146, 1152 (7th Cir. 1982); *Hirsch Lumber Company v. C. Ottaviano & Company, Inc.*, 18 F.2d 952, 952-53 (2d Cir. 1927).

Because of the disparity in tasks and duties the law imposes on Cement Division as the shipowner and on the City of Milwaukee as the wharfinger, there is a vast disparity in culpability. Cement Division remained in total custody and control of its vessel and, therefore, it retained the ultimate responsibility for ensuring her safety. The plaintiffs also had the costlier property at risk with the foreseeable result being that the damages claimed by the plaintiff are twenty-six times as great as those claimed by the defendant.

Even if the City had assumed the burden of providing an adequate warning or had ordered the E.M.

FORD to remain manned or move off berth, Cement Division's cost of precautions would not have been reduced. The shipowner would still have had to employ crew members at holiday rates or expend the time and money necessary to move the ship to another berth. Therefore, any warning or order from the City was merely an added cost of assuring the safety of the property involved in the allision. Under these circumstances the court has assigned ninety-six percent of the causal fault to Cement Division and the other plaintiffs and four percent of the causal fault to the defendant City of Milwaukee.

C. WARRANTY

Cement Division is also making claims against the City for breach of a wharfinger's express and implied warranties of workmanlike service and a safe berth.

The express warranty claim is not supported by the facts. Although the City's Dock Superintendent Stanley Blawas may have assured Cement Division's Fleet Captain Eugene Stafford that Terminal No. 4 at Slip No. 2 was a safe berth when they entered into a winter mooring agreement for the E.M. FORD on November 15, 1979,[47] the FORD never used this berth. There is no testimony in the record that the City subsequently made any express warranties to Cement Division when it agreed to allow the E.M. FORD to remain at Terminal Pier No. 1 in South Slip No. 1 on December 22, 1979. Moreover, Cement Division is claiming that the turbulent conditions arose on December 24 due to the "unique characteristics" of South Slip No. 1. If South Slip No. 1 is "unique," the plaintiff could not have relied on "warranties" made concerning any other outer harbor berth. Consequently, there is no basis for Cement Division's breach of express warranty claim.

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[47] Although the agreement to rent the berth was memorialized in a letter from Stafford to Blawas, *see* Exhibits 106 & 130, the alleged express warranty to provide a safe berth was not memorialized.

The implied warranties of a wharfinger are coextensive with the wharfinger's duties under tort law. *Compare Sims v. Chesapeake and Ohio Railway Company,* 520 F.2d 556, 561 (6th Cir. 1975) (implied warranties of wharfinger) *with United States v. Mowbray's Floating Equipment Exchange, Inc.,* 601 F.2d 645, 646 (2d Cir. 1979) (standard of care of wharfinger). Thus, the City breached its implied warranties to the same extent it breached its maritime law duties as a wharfinger.

After trial, the plaintiffs called the court's attention to the opinion of the Sixth Circuit in *Oglebay Norton Company v. CSX Corporation,* 788 F.2d 361 (6th Cir.), *cert. denied,* 107 S. Ct. 173 (1986), in which the court ruled that a shipowner was entitled to indemnity from a wharfinger for breach of the wharfinger's implied warranty of workmanlike service. The plaintiffs say that *Oglebay* shows "under what circumstances a breach of that warranty results in a shipowner's entitlement to full indemnification even in the face of the shipowner's own negligent conduct." Letter of Attorney Harney B. Stover, Jr. to Judge Thomas J. Curran (June 20, 1986).

In *Oglebay* a member of the ship's crew was crushed to death when he slipped or tripped on the dock and fell between the vessel and the dock face. The shipowner settled the wrongful death claim, then looked to the wharfinger for indemnity. The appellate court affirmed the trial court's findings that the wharfinger had breached its implied warranty of workmanlike service because the dock was strewn with wet coal; because there was no emergency lighting; and because the dock structure was inherently dangerous. Consequently, the court concluded that the shipowner was entitled to indemnity even though the ship's captain may have been negligent by failing to provide lighting or by failing to anchor elsewhere. The court noted that suing on a warranty is a contract action, so "comparative fault has no meaning in an indemnity action." *Id.* at 367 n.13.

According to the *Oglebay* court, "a shipowner is entitled to indemnity when a breach of the warranty of workmanlike performance results in loss *'absent conduct on [the shipowner's] part sufficient to preclude recovery.'* " *Id.* at 366 (quoting *Weyerhaeuser Steamship Company v. Nacirema Operating Company,* 355 U.S. 563, 567 (1958)). In the Sixth Circuit "conduct sufficient to preclude recovery" is "conduct which prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty." *Oglebay Norton Company,* 788 F.2d at 366 (quoting *Turner v. Global Seas, Inc.,* 505 F.2d 751, 753-54 (6th Cir. 1974)). The *Oglebay* court refused to deny indemnity based on other types of negligent conduct on the part of the vessel owner because to do so "ignores the nature of the wharfinger's warranty to maintain a safe berth and the wharfinger's control over the dock."

Oglebay Norton Company, 788 F.2d at 367. *See also Ammesmaki v. Interlake Steamship Company,* 342 F.2d 627, 632 (7th Cir. 1965). The court pointed out that, although Oglebay was in control of the mortally injured seaman and the mooring, the wharfinger was under an obligation to the shipowner to cure the dangerous conditions of the dock which caused the injury. *Id.*

The doctrine of indemnity shifts the entire amount of the loss from one party to another. *See Hillier v. Southern Towing Company,* 714 F.2d 714, 719-21 (7th Cir. 1983). There are three different bases for indemnification in admiralty: implied indemnity because of the relationship of the parties, contract indemnity, and tort-based indemnity. *Oglebay* is a case of indemnity implied because of the relationship of the parties and because one party had control over the instrumentality of the injury. Implied indemnity has also been recognized in relationships involving vessels and contractors, *see, e.g., Waterman S.S. Corporation v. Dugan & McNamara, Inc.,* 364 U.S. 421, 424-25 (1960), and between the parties to charter party contracts. *See, e.g., Venore Transportation Company v. Oswego Shipping Corporation,* 498 F.2d 469 (2d Cir.), *cert. denied sub nom. Banco Do Brasil v. Venore Transportation Company,* 419 U.S. 998 (1974).

Cement Division has cited no authority for the proposition that the law has recognized that the relationship between a wharfinger and a vessel owner in an allision case involving property damage warrants a shifting of the entire loss to the wharfinger regardless of the conduct of the vessel owner. The sinking of the E.M. FORD does not present a situation in which the wharfinger had the total responsibility for avoiding the risk or total control over the property at issue. Without this critical element of control by the proposed indemnitor, the legal underpinnings of the implied indemnity award in *Oglebay* do not apply.

Cement Division and the City of Milwaukee did not negotiate any indemnity provision as part of the agreement to allow the E.M. FORD to use the berth at South Slip No. 1, so there is no basis for contractual indemnity. Tort-based indemnity is similarly inapplicable in this case. Before the rule of comparative fault, total-based indemnity was employed where there was a great disparity in the fault of the parties liable to the plaintiff. The theory is that the indemnitor is guilty of active negligence while the indemnitee is guilty only of passive fault with passive fault being restricted to situations in which the tortfeasor is merely vicariously liable or in which liability is based upon a technical reason unrelated to personal fault. *See* T. Schoenbaum, *Admiralty and Maritime Law* § 4-15 (West 1987). In the case at hand the plaintiff's fault is much greater than that of the defendant and the defendant's conduct does not fit the narrow definition of "passive fault." Consequently, the court concludes that the all-or-nothing approach of indemnity is inappropriate in this case and that the traditional principles of comparative fault must be used to apportion liability among the parties. *See Gator Marine Service Towing v. J. Ray McDermott & Company,* 651 F.2d 1096, 1100 (5th Cir. 1981).

ORDER

By agreement of the parties and order of the court, only the liability issues were tried before the court during the first phase of this bifurcated trial. Consequently, the court has made no determination of damages. Accordingly, the court ORDERS that, within thirty (30) days of the date of this Decision and Order, Cement Division and the City of Milwaukee shall file a stipulation of damages. Failing this, a second phase of this trial will be scheduled to determine damages.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 30th day of June, 1989.

/s/ Thomas J. Curran
Thomas J. Curran
United States
District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 21, 1990.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INC., et al.,	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
Plaintiffs-Appellants,	)	
No. 89-2631 v.	)	
CITY OF MILWAUKEE,	)	No. 80 C 1001
Defendant-Appellee.	)	Thomas J. Curran, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

②

Supreme Court, U.S.
FILED
MAR 18 1991
OFFICE OF THE CLERK

No. 90-1299

In The

Supreme Court of the United States

October Term, 1990

◆

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

◆

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

RESPONDENTS' BRIEF IN OPPOSITION

◆

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QUESTION PRESENTED FOR REVIEW

Respondents contend that the only question presented for review is as follows:

1. Did the United States Court of Appeals for the Seventh Circuit have the authority to reapportion liability in this admiralty collision case on the ground that, as a matter of law, the district court's detailed findings of fact would not support an apportionment of more than two-thirds of the liability to Respondents.

Respondents do not believe that other elements set forth in Question No. 1 in the Petition (Pet. i), i.e., making new findings of fact (other than reapportionment) and reweighing the evidence, occurred or are in question, or that Question No. 2 in the Petition (Pet. i) is relevant.

LIST OF ALL PARTIES TO THE PROCEEDING

The list of parties set forth in the Petition (Pet. ii and iii) is true and correct.

The following Respondents have parent corporations:

1. Allstate Insurance Company is a wholly owned subsidiary of Sears, Roebuck & Co.

2. Highlands Insurance Company is owned by Halliburton Company.

3. Insurance Company of North America, U.K. Ltd. "G" A/o is owned by CIGNA Corporation.

4. Insurance Company of North America, U.K. Ltd. "O" A/o is owned by CIGNA Corporation.

As far as in known, the balance of the Respondent corporations are independent entities.

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No. 90-1299

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In The

Supreme Court of the United States

October Term, 1990

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CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

◆

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

◆

RESPONDENTS' BRIEF IN OPPOSITION

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I. STATUTES INVOLVED

In addition to Fed. R. Civ. P. 52(a), Findings by the Court (Pet. 3), there is involved 28 U.S.C. § 2106 as follows:

> § 2106. **Determination**
>
> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order,

or require such further proceedings to be had as may be just under the circumstances.

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II. STATEMENT OF THE CASE

The statement of the case in the Petition (Pet. 3-10) is incomplete. It omits a number of necessary facts for consideration. and contains a substantial amount of argument. Consequently, Respondents will restate the case.

A. Nature of the Case

This case arises out of the sinking of the S/S E.M. FORD in a storm during the afternoon and evening of December 24, 1979. Respondents are the owner and the hull and cargo insurers of the ship (hereinafter collectively "Shipowner"). Petitioner is the City of Milwaukee (hereinafter "City") at whose dock, i.e., Terminal No. 1 in South Slip No. 1 in the outer harbor at the Port of Milwaukee, the ship was moored when the storm arose. Shipowner seeks recovery from the City for the damages incurred by the ship and its cargo, alleged in the Complaint to be $6.5 million, claiming that the City breached its obligations as a wharfinger by assigning the dock at which the FORD was laid up, when the City knew that the dock and slip were peculiarly vulnerable to a storm such as arose on December 24, 1979, and by failing to warn as to the dangers about which it knew, and that the City breached its warranty to provide a safe berth. The City denied fault and alleged contributory negligence on the part of the Shipowner, counterclaiming for damage to its dock and seawall in the alleged sum of $250,000.

B. Course of Proceedings

Shipowner commenced this action in admiralty on October 29, 1980, ten months after the disaster, and the City was served on November 3, 1980 (Pet. App. 17a). The City filed an Answer and Counterclaim on January 15, 1981 (Pet. App. 17a-18a). By verbal order at a Status Conference held on December 16, 1981, trial of the case was ordered bifurcated as to the issues of liability and damages (Pet. App. 19a). From early 1981 through most of 1983, the parties conducted extensive discovery, but only on the issue of liability.

The issue of liability was tried to the district court in admiralty from January 6, 1986, through January 24, 1986 (Pet. App. 19a-20a). The district court entered its Interlocutory Judgment (styled "Memorandum of Decision and Order") on June 30, 1989 (Pet. App. 15a-144a).

C. District Court Decision

Essentially, the district court held that the Shipowner was free from any statutory faults, but was negligent and at fault for laying up the FORD at Terminal No. 1 in South Slip No. 1, for failing to employ or retain aboard a standby master or pilot and crew members who could navigate the vessel, for failing to maintain ship-to-shore radio-telephone communications, and for failing to monitor the weather (Findings 67 and 68, Pet. App. 58a-59a). It held the City to be negligent and at fault for allowing the FORD to temporarily lay up at Terminal No. 1 in South Slip No. 1 for a period of days, for failing to warn the ship that wind and wave conditions could develop which would endanger the vessel and the City's property, for failing to order the ship to remain manned or move off the berth (Findings 65 and 66, Pet. App. 57a-58a), and for breach of its warranty to provide a safe berth (Finding 72, Pet. App. 59a). The district court apportioned 96% of the negligence and fault to the Shipowner and 4% of the negligence and fault to the City on the basis that the Shipowner had the costlier property at risk with the reasonable result being that the damages claimed by the Shipowner (in its Complaint) would be 26 times as great as those claimed by the City (in its Counterclaim) (Pet. App. 138a-139a).

D. Court of Appeals Decision

Appeal was taken by the Shipowner to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals entered its Decision and Judgment on October 16, 1990 (Pet. App. 1a-14a). It held that the 96/4 apportionment of liability by the district court between the Shipowner and the City was clearly erroneous because the Court of Appeals, upon review of the record, was left with a clear conviction that the district court had made a mistake (Pet. App. 11a). The Court of Appeals reapportioned liability between the Shipowner and the City on a 2/3-1/3 basis, holding that no reasonable trier of fact could apportion more than two-thirds of the liability to the Shipowner (Pet. App. 11a-13a).

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III. STATEMENT OF FACTS

The Shipowner is and was the owner and operator of the S/S E.M. FORD (Pet. App. 25a-26a). The FORD was a self-unloading, bulk cement carrier, 413.67 feet in length and 50 feet in breadth, powered by a 1500 h.p. engine (Pet. App. 27a). The City is a Wisconsin municipal corporation which owned, operated and furnished for payment docks, wharves, piers and vessel berths in the harbor of Milwaukee, including the vessel berth at Terminal No. 1 in South Slip No. 1 (Pet. App. 27a). The City employed Stanley Blawas as its Dock Superintendent (Pet. App. 27a). He had authority to offer berths at City docks in the Port of Milwaukee to vessels (Pet. App. 30a).

In mid-November 1979, the Shipowner entered into a written contract with the City for the winter layup of the S/S E.M. FORD at Terminal No. 4 in South Slip No. 3 in Milwaukee's outer harbor (Pet. App. 29a-30a). At that time and in connection with that contract, Blawas assured the Shipowner that Terminal No. 4 in South Slip No. 3 was a safe, winter layup berth (Pet. App. 30a). Five weeks later, on December 21, 1979, as the FORD was approaching the Port of Milwaukee carrying a cargo of bulk cement, the Shipowner decided that the ship would lay up at the Shipowner's terminal in Milwaukee's inner harbor for the winter, but would moor temporarily at Terminal No. 4 in the South Slip No. 3 to wait for another vessel to precede her to the Shipowner's terminal and unload before the FORD could go to the Shipowner's terminal to lay up for the winter (Pet. App. 32a-33a).

Following that decision and as the FORD was still approaching Milwaukee, the ship's Master, Capt. Gallagher, talked on the radio-telephone with Blawas and told him about the change in plans. Blawas offered to let the FORD tie-up temporarily at Terminal No. 1 in South Slip No. 1, which was a slip similar to South Slip No. 3

but more conveniently located (Pet. App. 33a-34a). Both slips were in the outer harbor and just a short distance from each other. Capt. Gallagher agreed to that arrangement and when the FORD arrived, she proceeded to Terminal No. 1 in South Slip No. 1 where she moored at the dock (Pet. App. 34a).

Early the next morning, i.e., on December 22, 1979, the FORD's orders were changed again and Capt. Gallagher was instructed to lay up the ship temporarily where it was and send most of the crew home for Christmas (Pet. App. 40a), leaving just five men aboard to keep the boiler going so that the ship would remain warm and would be ready for use when the men arrived back after the Christmas vacation (Pet. App. 42a-43a). Blawas came aboard the ship that morning and while there conferred with Capt. Gallagher. They talked about the captain's orders, about the fact that most of the ship's crew were going home for Christmas and about the berth where the vessel was tied up (Pet. App. 41a). Blawas stated that the outer harbor could get "heavy" if a storm came up, but when questioned by Capt. Gallagher as to whether there was any problem in leaving the FORD there, he predicted "that the waves in South Slip No. 1 would not exceed one-to-two feet" (Pet. App. 101a). At the time that was said, the City had superior knowledge that dangerous conditions could develop in South Slip No. 1 because it had records of daily wave heights back to 1958, which included occasional wave heights in South Slip No. 1 of 8 to 10 feet, and knew that outer harbor slips were not suitable for winter moorings (Pet. App. 115a). Relying on Blawas' representation, Capt. Gallagher determined to leave the FORD in temporary layup at that location (Pet. App. 102a). Later that day the crew left the ship for the Christmas holidays, except for the five men left behind to man the temporary layup (Pet. App. 42a).

Two days later, i.e., on December 24, 1979, beginning at about noon, a storm occurred over Lake Michigan and at the Port of Milwaukee. Sizable waves developed in South Slip No. 1, eventually reaching heights of 10-15 feet. The FORD broke away from the dock in the afternoon and over the course of a number of hours pounded the seawall at the inner end of the slip. Late in the evening she sank in the middle of the slip, despite heroic efforts to save her on the part of the five men who were aboard the ship, along with a temporary port captain who was hired by the Shipowner and some land-based personnel of a shoreside contractor (Pet. App. 51a-55a).

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IV. SUMMARY OF ARGUMENT

In its lengthy Decision containing extensive and detailed findings of fact, the district court apportioned liability between the Shipowner and the City on a 96/4 basis on the ground that, because the Shipowner had the costlier property at risk, the foreseeable result was that the damages claimed by the Shipowner in its Complaint ($6.5 million) would be 26 times as great as the damages claimed by the City in its Counterclaim ($250,000), so that the Shipowner was 26 times as negligent as the City. Since there is no evidence in the record of property valuations or damages to either of the parties and there is no statutory or case law to substantiate an apportionment of liability on the basis of alleged damages, the Court of

Appeals was left with a definite and firm conviction that a mistake had been committed by the district court. Pursuant to its statutory power and applicable case law, and upon full review of the record, the Court of Appeals concluded, as a matter of law, that no reasonable trier of fact could apportion more than two-thirds of the liability to the Shipowner. Accordingly, the Court of Appeals modified the district court's finding of fact as to liability in accordance with what it considered to be the outer limits of the discretion of any reasonable trier of fact, apportioning two-thirds of the liability to the Shipowner and one-third of the liability to the City. Because the decision of the Court of Appeals' turned on a question of law, rather than on a finding of fact, and because the record was equally as "cold" for the district court to decide apportionment as it was for the Court of Appeals to review it, the Court of Appeals was in no worse position than the district court to evaluate the record and apportion liability. The City exercised its right to appeal the reapportionment in its Petition for Rehearing to the Court of Appeals which was unanimously denied.

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V. ARGUMENT

A. Introduction

"May she rest in peace," concluded the United States Court of Appeals for the Seventh Circuit in its unanimous Decision reversing the district court as to apportionment of liability (Pet. App. 13a). By the time the United States Supreme Court considers the City's Petition, we will be eleven years and three months after the disaster of

December 24, 1979, and ten years and five months after the lawsuit was commenced. Whatever the ship may be doing, the case is not resting, much less resting in peace; and the fact remains that the parties have not yet even discovered, much less tried, the issue of damages.

B. The District Court Erroneously Apportioned Liability in Proportion to Damages Alleged in Pleadings

The Decision of the district court (Findings No. 70 and 71, Pet. App. 59a) apportioned liability between the Shipowner and the City in direct proportion to damages alleged in the Complaint (for the Shipowner) and the Counterclaim (for the City) on the ground that, because the Shipowner had the costlier property at risk, the foreseeable result was that the damages claimed by the Shipowner would be 26 times as great as those claimed by the City (as dock owner) and therefore the Shipowner was 26 times as negligent as the City, giving rise to the 96/4 apportionment of liability between the two (Pet. App. 138a-139a). This flew in the face of the fact that the damage issue was bifurcated and had not even been the subject of discovery, much less trial. There is no evidence in the record as to the value of any property involved in this matter, even including the ship, so there is no basis for the Court's statement that the Shipowner had the costlier property at risk. There is absolutely no evidence of damages in the record. There is no statutory or case law to substantiate an apportionment of liability on the basis of alleged damages resulting from an accident. It is clear that the district court's apportionment of damages, based upon either property valuation or alleged damages incurred by the parties, or both, was erroneous in that it had neither legal nor factual foundation.

C. The Court of Appeals Correctly Prescribed Limits for Apportionment of Liability as a Matter of Law

1. The Court of Appeals Had the Power to Modify

28 U.S.C. § 2106 authorizes appellate courts to modify judgments brought before them for review or to remand to the trial court for further appropriate proceedings. With regard to findings of fact made by a court sitting without a jury, that grant of authority is limited by Fed. R. Civ. P. 52(a). Under Rule 52(a), the appellate court may not set aside the court's findings "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer City, N.C*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The appellate court is not bound by the trial court's view of the law. *Complaint of Paducah Towing Co.*, 692 F.2d 412, 422, (6th Cir. 1982).

The numerous cases discussing the applicability of the "clearly erroneous" rule speak of pure questions of fact, pure questions of law, questions of subsidiary fact, and questions of ultimate fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66

(1982). In the last category there are sub-sets for pure facts which are merely ultimately decisive and for those which "clearly impl[y]" the application of standards of law. *Baumgartner v. United States,* 322 U.S. 665, 671, 64 S.Ct. 1240, 1244, 88 L.Ed. 1525 (1944). It is this last category of "legally derived ultimate facts" which must concern us here.

It has long been held that findings of fact derived from a trial court's misapprehension or erroneous conception of law are subject to modification by the appellate court without need for remand to the trial court. *United States v. United States Gypsum Co.,* 333 U.S. 364, 394, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), reh'g. denied, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948); *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 194 n.9, 83 S.Ct. 1773, 1784 n.9, 10 L.Ed.2d 823 (1963). When a trial judge's finding of fact is tainted by misapprehension or erroneous conception of controlling legal principles, review of the evidence by the appellate court is free from the constraints of the "clearly erroneous" rule. *Higginbotham v. Mobile Oil Corp.,* 545 F.2d 422, 426, 433 (5th Cir. 1977); *Southern Illinois Stone Co. v. Universal Engineering,* 592 F.2d 446, 451 (8th Cir. 1979); *Armco, Inc. v. Armco Burglar Alarm Co., Inc.,* 693 F.2d 1155, 1162 (5th Cir. 1982); *Power v. Union Pacific Railroad Co.,* 655 F.2d 1380, 1383 (9th Cir. 1981); *Cuddy v. Carmen,* 762 F.2d 119, 124 (D.C. Cir. 1985).

The Petitioner's statement of the law with regard to application of the Rule 52(a) "clearly erroneous" standard is generally correct. Appellate courts are not entitled to retry cases on the facts. Indeed, the Seventh Circuit has enunciated what may some day be referred to as the "dead fish" rule which makes the point in particularly pungent terms:

> "To be clearly erroneous a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *rehearing denied, cert. denied* ___ U.S. ___, 110 S.Ct. 141, 107 L.Ed. 2d 99 (1989).

However, appellate courts should and must make a "clearly erroneous" determination based on the "entire evidence in the record." *Bazemore v. Friday*, 478 U.S. 385, 403-404, 106 S.Ct. 3000, 3010, 92 L.Ed.2d 315 (1986).

2. The Court of Appeals' Decision to Reapportion Liability Turned on a Question of Law, Not on a Finding of Fact

Contrary to the City's assertions (Pet. 11) in this case, the Court of Appeals has not violated an "elementary" rule nor has it proceeded in a fashion which this Court has described as "incredible" nor does its decision conflict with prior decisions of this Court. Rather, the Court of Appeals perceived what Petitioner apparently has not. The district court's finding was not purely a matter of fact. It was a finding based upon a misapprehension or erroneous conception of the underlying law. As such, it is not governed by the decisions in *Anderson v. Bessemer City, N.C., supra; Pullman-Standard v. Swint, supra,* or *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 2d 739 (1986).

While Rule 52(a), and cases decided thereunder, normally would require remand for new fact-finding where pure fact is involved, exceptions have long been recognized where the trial court's error derives from an erroneous view of the law and where no further fact-finding is necessary. *Pullman-Standard, supra,* 456 U.S. at 292; *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634, 638 (4th Cir. 1987); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 186 (2nd Cir. 1975); (En Banc), *rev'd on other grounds,* 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), *reh'g denied,* 430 U.S. 976, 97 S.Ct. 1668, 52 L.Ed.2d 371 (1977); *Felder v. United States,* 543 F.2d 657, 671 (9th Cir. 1976).

It is important to keep in mind that here the Court of Appeals found the district court's extensive opinion and detailed findings of fact to be largely well reasoned, correct in finding that both the City and Shipowner were at fault and correct in finding that the Shipowner was more at fault than the City. (Pet. App. 10a) Out of a district court opinion of 144 pages, the Court of Appeals in effect modified one, and only one, finding, i.e., apportionment of liability between the parties. Then, using the correct formulation of the law of comparative negligence[1]

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[1] The City's argument relating to apportionment by cost of avoidance is a "red herring." The Court of Appeals mentioned the cost-of-avoidance concept as a basis for assessing culpability of each party (Pet. App. 11a) and determined that no unusual measures or costs would have been necessary for either the City or the Shipowner to avoid the loss. (Pet. App. 12a) With hindsight, the Court of Appeals' language regarding "distribution of the cost of avoidance" (Pet. App. 12a) could

(Continued on following page)

and the same facts as utilized by the district court, the Court of Appeals, within narrowly prescribed bounds, reallocated liability, not as a new finding of fact but as a matter of law that the most liability against the Shipowner which the facts could support would be two-thirds. In short, no additional fact-finding was necessary and remand to the district court not only would have been wasteful, but would have extended the history of this case further into its second full decade.

The device which allowed the Court of Appeals to achieve this judicial economy was its conclusion that "on the facts of this case, no reasonable trier of fact could apportion more than two thirds of the liability to National Gypsum." (Pet. App. 11a.) That was a legal conclusion, not a finding of fact. On the same facts as found by the district court, but now applying the correct underlying law, the Court of Appeals modified the finding of legally derived ultimate fact. It held *as a matter of law,* not that it would have decided the case differently, but rather that, applying the correct legal principle, upon remand the district court could not reasonably find the

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(Continued from previous page)

have been more precise. The court was really comparing the *opportunities* for avoidance. In so comparing, the Court of Appeals found that both the City and the Shipowner had an equal opportunity to avoid the loss prior to the berthing of the E. M. FORD. However, after the berthing, in the view of the Court of Appeals, the Shipowner had the only real opportunity. Thus, the Shipowner had two opportunities and the City had one, and the Court of Appeals held that *no reasonable trier of fact could apportion more than two thirds of the liability to the Shipowner.* Cost was not a factor.

Shipowner to be more than two-thirds liable. Based on this legal conclusion one may presume that the Court of Appeals would reverse and remand any subsequent judgment apportioning to the Shipowner a greater share of liability than two-thirds. Consequently, the Court of Appeals concluded that remand to the district court would be an empty and time-consuming gesture and reapportioned liability at the outer limits of the district court's discretion, i.e. two-thirds/one-third.[2] This is a familiar and time honored exercise of appellate administration. In *Chris-Craft Industries, supra,* where the district court had applied an improper legal standard in defining the measure of damages, the court of appeals modified in the same manner as was done in this instance. In formulating the correct measure of damages to be used and modifying the award (from $1,673,988 to $25,793,365), the court stated that its "upper limit is the minimum amount that the district court *could have awarded without committing reversible error,*" 516 F.2d at 187, emphasis added. In *Felder v. U.S., supra,* the Court of Appeals found that damages were incorrectly awarded based on an error in law. Using the findings of the district court, the Court of

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[2] Contrary to the City's implication (Pet. 19, n.6), the decision in *Hellenic Lines, Ltd. v. Prudential Lines, Inc., supra,* is no aberration in light of *United States v. Reliable Transfer Co., Inc.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). *Reliable Transfer* merely abrogated the divided damages rule in cases of marine collision involving mutual fault, except where the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. The principles guiding appellate courts in their treatment of trial court findings are universal in application and not limited to cases in admiralty or cases of collision.

Appeals changed the awards "only to the extent necessary *to bring them within an acceptable range.*" 543 F.2d at 671, emphasis added. In *Petition of United States Steel Corporation,* 479 F.2d 489 (6th Cir. 1973), cert. denied, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973), the appellate court modified damage awards, rather than remanding to the trial court again. The Court of Appeals stated that it could "*only modify to that maximum amount of damages which could have been awarded by the district court without constituting reversible error.*" 479 F.2d at 501, emphasis added.

The Court of Appeals in this case noted that, though it had discretion to remand to the district court, it determined not to do so. (Pet. App. 11a) Aside from its determination that no reasonable trier of fact could apportion more than two-thirds of the liability to the Shipowner, there are other reasons of judicial economy and justice which, though not enunciated by the Court of Appeals, may have influenced its decision. The deference to a trial court's findings prescribed by Rule 52(a) is based primarily on the trial court's superior ability to judge credibility of witnesses and weigh the likelihood of disputed facts. The principle does not apply here. Instead, the Court of Appeals held as a matter of law that the facts found by the district court could not support a finding of more than two-thirds liability on the part of the Shipowner.

D. The Court of Appeals Was in As Good a Position to Evaluate the Record As Was the District Court

1. Both Apportionment and Reapportionment Were On a Cold Record

This case was tried in January of 1986, five years before the district court would have had an opportunity upon remand to review its finding of liability apportionment. The district court's original decision had been issued in June of 1989, three-and-one-half years after that court had tried the case. Indeed, a review of the district court's decision indicates that it was prepared almost wholly based upon a transcript of the trial, transcripts of depositions and documentary evidence, as opposed to the recollections or notes of the district court. It is a fair assumption that the trial transcript was prepared for the sole purpose of refreshing the recollection of the district court because of the passage of time. The record was as cold for the district court as it would be for the Court of Appeals.

The decision of the district court contains an exhaustive discussion of the facts and is certainly more complete than the "brief, pertinent findings in respect to contested matters" required by Rule 53(a). *Matton Oil Transfer Corp. v. The Dynamic,* 123 F.2d 999, 1001 (2nd Cir. 1941); 5 Moore's Federal Practice, Para. 52.06[1], p. 52-151 (1990). Thus, the Court of Appeals was as well equipped to make its own review of the facts as was the district court.

With the exception of its finding regarding allocation of liability, the district court's findings of fact were accepted and approved by the Court of Appeals. Hence, credibility and demeanor of witnesses were in no way significant to the modification made by the Court of Appeals.

2. "May She Rest in Peace"

Finally, and of great significance, is the age of this case. The FORD sank on December 24, 1979. The action was filed on October 29, 1980. Trial was conducted in January of 1986 and, after three-and-one-half years, the district court rendered its decision in June of 1989. More than 11 years have now passed since the original loss and more than 10 years since the complaint was filed. In similar circumstances, where an appellate court has chosen not to remand to the trial court for additional fact-finding, lesser delays have been cited as part of the rationale for modifying at the appellate level.

In *Felder, supra,* a seven-year-old case, the court stated:

> "Moreover, consideration of the passage of time since the commencement of this litigation compels us to such an early disposition of the matter. A remand could easily lead to a further appeal . . . the interests of justice and the best interest of the parties require that we recalculate the damages on the basis of the record before us and order entry of a modified judgment." 543 F.2d at 671.

In *Chris-Craft Industries, Inc., supra,* where the case was in its sixth year and on its third appeal, the court cited as an additional reason for modification the "extraordinary length of time this litigation has already lingered." 516 F.2d at 186.

E. There is No Deprivation of the City's Right to Appeal

The City argues in its Petition (Pet. 23-24) that, as a result of what it characterizes as modifications of the district court's finding of fact as to liability made by the Court of Appeals, it has been effectively deprived of the right to appeal from those modified findings. The City's argument incorrectly presumes that the Court of Appeals' decision was merely a substitution of a finding of fact whereas, as previously argued, it was a legal conclusion fixing the Shipowner's liability at the most the law could allow. However, even if arguendo the City's appellate rights have been limited, the argument fails to recognize that such "limitation" is a fact of life in any case on appeal where an appellate court has exercised its authority under 28 U.S.C. § 2106 and modified the findings of a trial court. The City is now doing the same thing in its Petition that the district court did in its Decision. The City argues in its Statement of the Case (Pet. 4) that the Court of Appeals' reapportionment of liability has increased the City's potential liability from a range of approximately $0 - $40,000 to a range of approximately $2 million to $4 million, depending upon how the unresolved damages issues are decided. This is based upon the same damage allocations in the Complaint and Counterclaim upon which the district court erroneously based its apportionment of liability, plus a possible award of prejudgment interest. There is not one scintilla of evidence in the case as to damages because the damage issue was bifurcated and has not even been the subject of discovery to date. There is no basis for the City's statement (argument) just as there was no basis for the district court's statement that the Shipowner had the costlier property at risk when there was no evidence in the record as to the cost or value of any property involved in the case.

In addition, the City had an opportunity to bring this very concern before the Court of Appeals in its Petition for Rehearing. (Resp. App. 1-21 at 8-12) The issue was considered by the Court of Appeals and rejected (Pet. App. 145a). The City has cited no cases in support of its contention. The argument has neither foundation nor merit.

◆

VI. CONCLUSION

Because the district court misapprehended the underlying law in order to reach its findings of fact with regard to apportionment of liability, the Court of Appeals was left with a clear conviction that the district court had made a mistake and held the 96/4 apportionment of liability to be clearly erroneous; it failed the "dead fish" test. Upon review of the record, the Court of Appeals agreed with the district court that both parties were negligent and that the Shipowner was more negligent than the City. Without touching or changing any other findings of fact, the Court of Appeals reapportioned liability to two-thirds/one-third based on the legal conclusion that no reasonable trier of fact could have assessed more than two-thirds of the fault to the Shipowner. It had the power to do so pursuant to 28 U.S.C § 2106. Faced with that, any subsequent assessment of greater liability against the Shipowner would be unlikely to survive further appeal. It would rest on a record even colder than that which was before the Court of Appeals.

Respondents request that, over eleven years after the fact of accident and almost ten and one-half years after commencement of the litigation, the issue of liability be put to rest with the ship so that the parties can get on with discovery and trial, if necessary, as to the remaining issue of damages.

Respectfully submitted,

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March 18, 1991

RESPONDENT'S APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 89-2631

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INCORPORATED, NEW YORK MARINE MANAGERS, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 80-C-1001 – Thomas J. Curran, Judge.

PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING IN BANC AND APPENDIX

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References in this petition to the various appendices in this case are as follows:

App.	Appendix attached to petition
Sh. App.	Short Appendix filed by appellant
Apl. App.	Separately bound appendix filed by appellant

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IN THE
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FOR THE SEVENTH CIRCUIT
No. 89-2631

CEMENT DIVISION, NATIONAL GYPSUM COMPANY,
REED & BROWN, INCORPORATED, NEW YORK
MARINE MANAGERS, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 80-C-1001 – Thomas J. Curran, Judge.

PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING IN BANC

This decision should be reheard in banc because it conflicts with decisions of the United States Supreme Court and other courts of appeals. This court's reallocation of fault exceeds the authority granted it by Fed. R. Civ. P. 52(a) and therefore conflicts with *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The decision also applies a new standard, "cost of avoidance," in apportioning fault in admiralty cases, which is at variance with *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), and the decisions of other courts of appeals. Moreover, the decision fails to give the required deference to the findings of the district court, and reaches a decision predicated upon findings not made by the district court. Rehearing is required due to the critical importance of appellate courts adhering to the fundamental limitations on their power. Furthermore, the new standard formulated by this court in apportioning fault in admiralty cases lacks support in law or logic and will interject uncertainty into an area of the law which routinely involves sizeable damages.

This is a suit in admiralty between the owners and insurers of the SS EM FORD and the City of Milwaukee, as wharfinger. During a great northeasterly storm, the FORD, moored in an outer harbor slip, broke loose from its moorings, damaged the City's wharf and sunk in the slip. The district court, in a 140-page decision, found both National Gypsum and the City negligent and contributorily negligent, and allocated fault 96 percent upon National Gypsum and 4 percent upon the City. This court, in an 11-page opinion, reversed the district court and reallocated fault two-thirds upon National Gypsum and one-third upon the City. (App. 1-11). This increased the City's potential liability from a range of approximately $0 to $40,000 to a range of approximately $2 million to $4 million, depending upon how unresolved damages issues are decided.

I. This Court Erred By Not Remanding The Case To The District Court For Reallocation Of Fault.

A. Rule 52(a) precludes this court from reallocating fault.

The decision of the district court apportioning fault 96/4 was a finding of fact.[1] When this court reapportioned fault 2/3-1/3 it made a new finding of fact. This court is precluded from making a new finding reallocating fault by Rule 52(a), Fed. R. Civ. P., because to do so it must conduct what amounts to a *de novo* weighing of the evidence in the record, a procedure this court is not permitted to undertake under Rule 52(a). *Anderson,* 470 U.S. at 573.[2]

Although appellate courts have broad power under 28 U.S.C. § 2106 to modify judgments, the power is delimited by Rule 52(a), Fed. R. Civ. P. *Felder v. United States,* 543 F.?d 657 (9th Cir. 1976). Once an appellate court decides that a finding is "clearly erroneous," it has no authority to reweigh the evidence and replace that erroneous finding with its own finding.

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[1] A finding of negligence is a finding of fact reviewable under the "clearly erroneous" standard. *McAllister v. United States,* 348 U.S. 19, 20, 22-23 (1954). In reviewing the apportionment of negligence under comparative negligence principles, the court is merely reviewing two findings of negligence rather than one. Accordingly, courts have consistently done so under the "clearly erroneous" standard. *E.g., Alkmeon Naviera, S.A. v. M/V Marina L,* 633 F.2d 789, 796 (9th Cir. 1980).

[2] Prior to the decision in *McAllister v. United States,* 348 U.S. 19 (1954), appellate courts had the power to conduct *de novo* review in admiralty cases. In *McAllister,* the Court held that admiralty cases tried without a jury must be reviewed in accordance with Rule 52(a).

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Anderson at 573 (quoting in part *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). The rationale for the limitation is plain:

> The trial judge's major role is the determination of fact, and with experience in fulfulling [sic] that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. at 574-75.

Accordingly, the Court in *Anderson* held that Rule 52(a) not only precludes appellate courts from reweighing the evidence, but also from conducting its review in a manner that is tantamount to a *de novo* weighing of the evidence. The Court reversed because "the Fourth Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record." *Id.* at 576.

B. An appellate court's authority to reduce or increase damages does not include the authority to reapportion fault.

There is no well-reasoned precedent for this court's reapportionment of fault in an admiralty case. Only in

Hellenic Lines, Ltd. v. Prudential Lines, Inc., 813 F.2d 634 (4th Cir. 1987), did an appellate court reverse a district court's finding of fault and reapportion fault. The decision does not provide well-reasoned precedent for this court's decision. The Fourth Circuit based its authority to reapportion fault upon this premise: "this court may apportion liability, provided no further fact finding is necessary for the reapportionment." *Id.* at 638. The premise is a contradiction because the reapportionment itself is a new finding of fact.

The precedent cited in *Hellenic Lines, Ltd.* does not support the proposition that an appellate court may reapportion fault. The cases cited concerned adjustments in the amount of damages awarded; none concern or approve reapportionment of fault on appeal. In *Insurance Co. v. Piaggio,* 83 U.S. (16 Wall.) 378 (1873), the Court deducted from the judgment the amount of damages erroneously allowed. In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 516 F.2d 172 (2d Cir. 1975) (en banc), *rev'd on other grounds,* 430 U.S. 1, *reh'g denied,* 430 U.S. 976 (1976), the court held that it had the authority to modify the judgment to increase the award of compensatory damages because (1) the critical evidence was largely documentary, *Id.* at 186, and (2) the court could do so without having to evaluate the testimony of witnesses. *Id.* at 186 n.16. In *Felder,* 543 F.2d at 67, the court confined its modification to a recalculation of damages under circumstances where most of the changes made involved arithmetic calculations that the appellate court could perform as easily as the trial court.

The Fourth Circuit also cited 2 *Federal Procedure* L. Ed. § 3:691 (1981) as authority, but this section only recites the holding in *Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir. 1973), *cert. denied*, 414 U.S. 859 (1973), that if an appellate court finds that a damage award by a trial judge is clearly erroneous because it is excessive, it cannot under Rule 52(a) exercise its independent judgment and reduce the award to a level that it feels is appropriate, but can only reduce the damages to a level that would not have mandated reversal, had the trial court awarded that amount of damages originally. 2 *Federal Procedure*, at 639; *United States Steel*, at 501.

The rationale permitting an appellate court to reduce damages is inapplicable to the reapportionment of fault. When the plaintiff's damages are reduced to the amount that could have been awarded without constituting error, the plaintiff has no cause to complain because the plaintiff, although his or her damages are reduced, has received all that the district court could have awarded, and the defendant is liable for less than the district court had awarded. When an appellate court reduces the plaintiff's degree of fault, the opposite occurs: the plaintiff, rather than receiving less than the district court had awarded, receives more, and the defendant, rather than paying less, pays more. The defendant is therefore required to pay more damages by an appellate court that has not heard the evidence firsthand and is not permitted to re-weigh the evidence.

The authority of an appellate court to increase damages under limited circumstances does not provide authority for reapportionment of fault because damages are quantified or quantifiable, and therefore, susceptible to adjustment by calculation. When courts have increased damages, they have done so when they were assured that they were not undermining the integrity of the trial process. For example, in *Simpson v. United States,* 322 F.2d 688 (5th Cir. 1963), the court increased the damages when it found that "there are firm guidelines establishing the basic elements of the award and it can be computed with some degree of certainty as easily by the appellate court as by the trial judge . . . " *Id.* at 693. In *Dale Benz, Inc., Contractors v. American Casualty Co.,* 303 F.2d 80 (9th Cir. 1962), the court increased the damages where it was "in as good a position to determine the issues involved on the record before us as would be the trial judge on remand," and the "issues arise out of and are concerned with figures and arithmetical calculations." *Id.* at 82.

When an appellate court increases the amount of damages under these circumstances, neither party is harmed. The plaintiff receives a larger award than had been granted by the trial court and the defendant is liable for the same additional amount he or she would have been liable for if the trial court had recalculated damages on remand. Apportionment of fault, on the contrary, has no quantifiable component readily subject to recalculation, but is dependent upon the application of law to facts which are as rich and diverse as human experience. This exercise of judgment is more accurately done by the trier of fact because "[c]old records rarely reflect the look, the touch or the feel of the witness. . . . " *Mitchell v. Evelyn C. Brown, Inc.,* 310 F.2d 420, 425 (1st Cir. 1962). The difficulty of accurately judging fault based upon oral testimony given in the district court is well illustrated, as discussed below, in this case.

II. The Finding Of The District Court Allocating Fault Is Not "Clearly Erroneous".

A. The district court made no error of law in allocating fault.

Although this court described the district court's opinion as "thorough and largely well-reasoned" and "basically correct," it found that the district court's allocation of fault was clearly erroneous. This court did not find that any finding of fact or conclusion of law relied upon by the district court in making its allocation of fault was clearly erroneous. Rather, this court concluded that the district court might have apportioned liability according to the amount of property each side had at risk. It based this conclusion upon a single statement of the district court in its discussion of foreseeability that National Gypsum had the costlier property at risk and upon the fact that the apportionment approximated the alleged value of property at risk. This court held that it could not accept the district court's apportionment of fault because it was either arrived at by an incorrect application of comparative negligence principles, or because the district court failed to adequately explain how it arrived at the allocation of fault. If this court found that it could not identify the assumptions upon which the district court acted, then it should remand the case for clarification.[3] The 140-page decision of the district court, however, more than adequately explains its apportionment of fault. This court should have limited its review to a determination of whether the district court's allocation of fault was clearly erroneous in light of the record as a whole.[4]

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[3] "A case should be remanded when it is impossible to define the assumptions upon which the district court acted." *Landau v. J.D. Barter Const. Co.*, 657 F.2d 158, 164 n.12 (7th Cir. 1981).

When this court stated that "a party's share of liability should not depend upon how valuable his property at risk was," it apparently held that the value of the property of the respective parties at risk should not be considered in apportioning fault. The district court, however, stated that the standard it applied in allocating fault was culpability. It further stated, relying primarily upon *S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 166-68 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980), that the adoption of the comparative negligence doctrine did not abolish the doctrine of contributory negligence in admiralty, but instead, merged the doctrine of contributory negligence into the doctrine of comparative negligence. Contributory negligence, unlike ordinary negligence, does not involve a breach of any duty owed to others, but the failure to reasonably safeguard one's own property. The district court found both National Gypsum and the City contributorily negligent. (Sh. App. 77-78). In light of the merger of the contributory negligence doctrine into the comparative negligence doctrine, it cannot be said unequivocally, as this court did without citation to authority or discussion of the finding of contributory negligence, that the value of the respective party's property at risk should not be a valid consideration in deciding the relative culpability of the parties when they failed to safeguard their own property.

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[4] Even if the district court relied upon a wrong ground in arriving at its decision, that in and of itself does not justify reversal. It is a settled rule of law that in reviewing a decision of a lower court, the appellate court must affirm if the result is correct, "although the lower court relied upon a wrong ground or gave a wrong reason." *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943), (*quoting*, *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

This court held, without citation of authorities, that "the doctrine of comparative negligence is generally supposed to be used to assess liability in proportion to the cost of avoiding the entire accident to each side." The notion that the burden of precaution, or to restate it in economic terms, the cost of avoidance, is a factor to be considered in the negligence context was suggested in the decision of Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The "Hand formula," however, was limited to assisting the court in determining whether action or inaction constituted negligence. This court, in *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982), approved the use of the "Hand formula" to determine whether conduct was negligent, but did so with the caveat that it was not holding that courts must use the "Hand formula" to determine negligence in all maritime cases.

In *Reliable Transfer Co.*, 421 U.S. at 411, the Court held "that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . . . " Under this standard, fault is apportioned in accordance with the relative culpability of the parties. *Harbor Tug & Barge, Inc. v. Belcher Towing*

Company, 733 F.2d 823, 825 (11th Cir. 1984); *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir. 1980).

No court has used the "cost of avoidance" analysis advocated by this court to apportion fault in an admiralty case. Numerous federal appeals courts have reviewed apportionments of fault by district courts without any reference to or consideration of the cost of avoidance. *See, for example, Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983); *Complaint of Interstate Towing Co.*, 717 F.2d 752 (2d Cir. 1983); *Getty Oil Co. (Eastern Operations), Inc. v. SS Ponce DeLeon*, 555 F.2d 328, 335 (2d Cir. 1977), *Portacci v. Moran Towing & Transport Co.*, 615 F.2d 293 (5th Cir. 1980); *Allied Chemical Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1057 (5th Cir. 1981). In addition, numerous district courts have allocated fault or reviewed allocations of fault by juries in admiralty cases without reference to or consideration of the "cost of avoidance." *Red Star Towing & Transport Co., Inc. v. "Ming Giant"*, 552 F.Supp. 367 (S.D. N.Y. 1983), *Complaint of Flota Mercante Grancolombiana, S.A.*, 440 F.Supp. 704, 726 (S.D. N.Y. 1977), *Bremmer v. Shedd*, 467 F.Supp. 261, 267 (W.D. Pa. 1979), *Afran Transport Co. v. S/T Maria Venizelos*, 450 F.Supp. 621, 623 (E.D. Pa. 1978), *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854, 875 (E.D. Pa. 1977).

B. This court did not give due deference to the district court's findings of fact.

An appellate court must accept the findings of the district court unless they are without adequate evidentiary support. 9 C. Wright & A. Miller, *Federal Practice and*

Procedure § 2585 (1971). Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson,* 470 U.S. at 574. The appellate court is not to give the facts another construction or resolve the ambiguities differently from the district court. *United States v. National Assoc. of Real Estate Boards,* 339 U.S. 485 (1950). An appellate court must take that view of the evidence and the inferences deducible therefrom which is most favorable to the party prevailing below. *Aunt Mid, Inc. v. Fjell-Oranje Lines,* 458 F.2d 712, 718 (7th Cir.), *cert. denied,* 409 U.S. 877 (1972).

This court did not give due deference to the district court's findings concerning the knowledge of National Gypsum and its captain of Milwaukee's harbor. This court stated that National Gypsum was "aware" of the regulations which prohibited winter mooring in Milwaukee's outer harbor because of the dangers of wave surges from northeasterly winds, and that National Gypsum had been "informed" in December of 1979 that ships berthed in Milwaukee's outer harbor were subject to heavy surges during storms with northeasterly winds. This court then stated that the district court "thought" that the FORD's captain could have predicted the possibility of wave surges based on the construction of the berth and his experience in general. These characterizations hardly view the district court's findings in the light most favorable to the City and make an unwarranted distinction between what the captain knew and what the captain's employer knew. The district court found (1) that the FORD's captain "knew or should have known of any dangers which could have developed due to wind and wave action" in Milwaukee's outer harbor and South Slip

No. 1 due to his training and experience as a Great Lakes ship master and his experience with similar harbors, (Sh. App. 22), (2) that the opening in the breakwall directly northeast of South Slip No. 1 was an "open and obvious" condition, and that the slip had little breakwall protection from wave action from the northeast, (Sh. App. 23), (3) that National Gypsum knew that Milwaukee's outer harbor was subject to heavy surges during storms with northeasterly winds, and (4) that National Gypsum was warned of the danger in reference to the mooring of the FORD at that location. (Sh. App. 17). National Gypsum's culpability should not be reduced because its captain might not have known of the information known to and the warning received by National Gypsum.

The court's characterization of the district court's findings regarding the City inaccurately describes the actions and knowledge of the City. This court stated incorrectly that "the City failed to warn" the FORD or National Gypsum "of any possible danger to the FORD." In fact, the district court found that when the FORD's captain informed Blawas of the ship's need to remain in Milwaukee, Blawas "warned that the outer harbor could get 'heavy' if a storm came up" and suggested that the FORD tie up at a berth in the inner harbor. (Sh. App. 28-29). The district court concluded, however, that the warning given by the City was inadequate and misled the captain. (Sh. App. 95, 110). There is a considerable difference between no warning, as found by this court, and an inadequate warning in the context of a conversation between a dock superintendent and the captain of a vessel. Any kind of warning to a ship's captain of danger to his ship places upon the captain the duty of further inquiry. (Sh. App. 57-58). If the captain relied solely upon the warning of Blawas, then the captain was negligent in doing so. (Sh. App. 59, 128).

This court further found that on the morning of December 22, 1979, the captain of the FORD informed Blawas that "most of the crew would be gone until December 26th or 27th, but that a skeleton crew would be left aboard the FORD during the interim." This finding conflicts with the district court's finding that the captain of the FORD stated only that "part of the crew would go home for the holiday." (Sh. App. 28). This court's misstatement of the evidence charges the City with greater knowledge of the make-up of the remaining crew than found by the district court. The district court specifically found that the City was not fully informed of the undermanning of the FORD when it noted that "unbeknownest to the City – the entire crew was being discharged and the captain was going on vacation." (Sh. App. 94, n.29).

The portion of Blawas' conversation with the captain relied upon by this court in making its finding that the City failed to warn the FORD was considered by the district court in the context of the record as a whole, and not in the isolated fashion it was apparently considered by this court. (Sh. App. 29). Viewing the conversation in light of the record as a whole, its significance diminishes considerably. The captain did not call Blawas to the ship; Blawas was on the ship by chance on other business. (Sh. App. 28, 93). The captain called Blawas forward to discuss access to shore power; the discussion of weather was an aside. (Sh. App. 151). The conversation was general; nothing in the record indicates that the captain specifically solicited Blawas' opinion as to whether the FORD, virtually unmanned, could ride out a large storm from the northeast in Slip No. 1. The captain was anxious to go home for the holidays. (Sh. App. 23). He was unreceptive to the "heavy" weather warning and did not question Blawas further. (Sh. App. 94).

This court did not view the evidence in a light most favorable to the City. It ignored the description of the conversation as a warning given by the impartial witness, Heckl. (Sh. App. 95). It gave greater weight to what Blawas might have meant when he told the captain that waives in the outer harbor could "get a little rough," than to his testimony that he assumed the captain was experienced and knew the weather conditions on Lake Michigan. (Apl. App. 152) Blawas' assumption was warranted because he was speaking with an experienced Great Lakes master who had entered the Port of Milwaukee thirty to forty times during his career. (Sh. App. 22, 26).

CONCLUSION

This court should grant the City's petition for rehearing and either affirm the order of the district court or, in the alternative, remand the case to the district court for reapportionment of fault.

Dated and signed at Milwaukee, Wisconsin this 30th day of October, 1990.

GRANT F. LANGLEY
City Attorney

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